IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM CRAIG BUIS and MIKALEAN JANE BUIS,

Plaintiffs,

vs. No. 91-C-992-E

THE CITY OF TULSA, OKLAHOMA, a municipal corporation, et al.,

Defendants.

O R D E R

Comes now before the Court for its consideration Defendants' Rule 59(E) and Local Rule 15(G) motion. After review of the pleadings, the Court finds Defendants' motion should be **DENIED.**

The Court is unpersuaded by Plaintiffs' argument of surprise regarding the Court's conversion of Defendants' Motion to Dismiss into a Motion for Summary Judgment. Here, Plaintiffs' had a full opportunity in their response briefs to rebut all facts outside pleadings; further, Plaintiffs' attached three items outside their own pleadings and addressed the fact that Defendants' motion could be converted to a motion for summary judgment.

Plaintiffs' argument that Buis v. City of Tulsa, Case No. M-90-082, contradicts the Court's decision on qualified immunity ignores the facts of this case. The Court's previous order (docket #40) specifically stated that **at the time** of Plaintiffs' prosecution, the law pertaining to verification of citations was unsettled.

44

IT IS THEREFORE ORDERED that Plaintiffs' Rule 59 and Local Rule 15(G) motion (docket #42) is hereby **DENIED.**

ORDERED this 27th day of May, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY DAVID McGUIRE, as personal representative of the Estate of Paul Gail McGuire, Deceased,

Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD,

Defendant.

No. 91-C-711-E

ORDER AND JUDGMENT

Comes now before the Court for its consideration Plaintiff's motion for leave to interview jury (docket #103) and Defendant's proposed judgment insofar as it awards costs (docket #100). After review, the Court enters the following Order:

The Court finds Plaintiff's motion for leave to interview the jury is without merit. Continental Gas Co. v. Howard, 775 F.2d 876 (7th Cir. 1985), cert. den., 475 U.S. 1122, 106 S.Ct. 1641, 90 L.Ed.2d 186 (1986). Moreover, Plaintiff's motion is untimely and the Court finds no evidence of any prejudicial information or outside influence affecting the jurors' decision. United States v. Hall, 424 F.Supp. 508 (W.D. Okla. 1975).

Here, the Court properly instructed the jury at the close of the evidence regarding all legal and evidentiary issues. Further, there is no evidence presented by Plaintiff that the jury acted improperly or that a "good cause" exists to justify an exception to

10

Local Rule 8, which provides:

> No person shall interview, examine or question any juror, or any juror's relative, friend or associate at any time concerning said juror's service in any trial, including the deliberations or verdict of a jury in any action, except on leave of Court upon a showing of good cause. (emphasis added)

Plaintiff has submitted no evidence to warrant an exception to the above-stated rule; therefore, Plaintiff's motion for leave to interview jury (docket #103) is hereby **DENIED.**

Additionally, the Court finds Defendant's proposed judgment assessing costs in the amount of $5,806.08 against the Plaintiff's estate to be reasonable under the circumstances.[1] The Court does recognize and appreciate Plaintiff's financial status; however, the Court finds such a judgment will affect only the Decedent's estate and will not create a hardship on any other persons or entity.[2]

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's proposed judgment and award of costs in the amount of $5,806.08 assessed against Decedent's estate is hereby adopted.

ORDERED this 27th day of May, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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[1]Decedent's estate has no assets of either real or personal property. Affidavit of Timothy David McGuire (docket #108).

[2]Defendant states it believes the costs awarded in this judgment can be recovered from the Decedent's liability insurance carrier if not collectable from the estate. (docket #109).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

W. DAVID HOLLOWAY, M.D., et al.,)
)
Plaintiffs,)
)
v.) Case No. 84-C-814 Eu
)
PEAT, MARWICK, MITCHELL & CO., et al.,)

ORDER OF DISMISSAL OF AMENDED COMPLAINT

This matter having come before the Court on the motion of the plaintiffs to voluntarily dismiss the amended complaint and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed, and good cause appearing therefore, it is ordered that this cause is dismissed with prejudice, except that in the event the settlement in Stover v. Peat Marwick Mitchell & Co., No. C-87-57-D in the District Court of Oklahoma in and for Creek County, Drumright Division, is not approved, plaintiffs shall have leave to reinstate the amended complaint. The dismissal shall be without costs to any party and without notice to the putative class, the Court finding that notice given in the Stover case meets all requirements for notice in this case.

DATED: May 25, 1993.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

W. DAVID HOLLOWAY, M.D., et al.,)
)
Plaintiffs,)
)
v.) Case No. 84-C-814 Eu
)
PEAT, MARWICK, MITCHELL & CO.,)
et al.,

ORDER OF DISMISSAL OF AMENDED COMPLAINT

This matter having come before the Court on the motion of the plaintiffs to voluntarily dismiss the amended complaint and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed, and good cause appearing therefore, it is ordered that this cause is dismissed with prejudice, except that in the event the settlement in Stover v. Peat Marwick Mitchell & Co., No. C-87-57-D in the District Court of Oklahoma in and for Creek County, Drumright Division, is not approved, plaintiffs shall have leave to reinstate the amended complaint. The dismissal shall be without costs to any party and without notice to the putative class, the Court finding that notice given in the Stover case meets all requirements for notice in this case.

DATED: May ___, 1993.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP A. WRIGHT, Personal Representative of the Estate of Helen Wright, Deceased,

Plaintiff,

v.

SPALDING AND EVENFLO COMPANIES, INC., d/b/a JUVENILE FURNITURE COMPANY, a/k/a QUESTOR JUVENILE FURNITURE COMPANY,

Defendant.

No. 91-C-442-B

O R D E R

In keeping with the order granting a new trial entered this date, the judgment of March 31, 1993, entered herein based upon the verdict of the jury returned on March 11, 1993, is hereby set aside and held for naught.

DATED this 27th day of May, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JULIA K. ALLAN, Plaintiff, vs. MAY'S DRUG STORES, INC., an Oklahoma corporation, Defendant.	)	Case No. 91-C-220-E

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED, by and between counsel for the parties hereto, that:

1. All claims presented by the plaintiff in her Complaint shall be dismissed with prejudice against May's Drug Stores, Inc., pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

2. Each party shall bear its own costs and attorneys' fees.

Dated May 27th, 1993.

Respectfully submitted,

Laura Emily Frossard, OBA #3151
1408 S. Denver
Tulsa, OK 74119
(918) 585-1811

AND

D. Gregory Bledsoe, OBA #847
1717 S. Cheyenne
Tulsa, OK 74119
(918) 599-8123

ATTORNEYS FOR PLAINTIFF
JULIA K. ALLAN

MOYERS, MARTIN, SANTEE,
IMEL & DETRICK

By _____
R. Scott Savage, OBA #7926
Terry M. Kollmorgen, OBA #13713
320 S. Boston, Suite 920
Tulsa, OK 74103-3722
(918) 582-5281

ATTORNEYS FOR DEFENDANT
MAY'S DRUG STORES, INC.

5/27/93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 26 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

NANCY OWENS, Plaintiff,	)	
vs.	)	CASE NO. 93-C-450B
MERCK & CO., INC., Defendant.	)	

DISMISSAL WITHOUT PREJUDICE

Comes now the Plaintiff, Nancy Owens, and pursuant to the provisions of Rule 41 (a), F.R.C.P., Defendant not having filed an answer, counter claim or other pleadings herein, hereby dismisses the above styled action WITHOUT PREJUDICE.

LOEFFLER, ALLEN & HAM

By _____
Sam T. Allen, III
P. O. Box 230
Sapulpa, Oklahoma 74067
PHONE: (918) 224-5302
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I certify that on the 25th day of May, 1993, I mailed a true and correct copy of the above and foregoing Dismissal, with postage fully paid thereon, to: (1) Mr. David Strecker, SHIPLEY, INHOFE & STRECKER, 3600 First National Tower, 15 East Fifth Street, Tulsa, Ok 74103-4307, and (2) Joel H. Kaplan, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Suite 4200, 55 East Monroe Street, Chicago, IL 60603, attorneys for Defendant.

_____
Sam T. Allen, III

EXHIBIT 1

FILED
MAY 26 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEFFLINE CORPORATION, et al.,
Plaintiffs,

v.

THRIFTY RENT-A-CAR SYSTEM, INC., and PENTASTAR TRANSPORTATION GROUP, INC.,
Defendants.

Case No. 91-C-841-B

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED as follows:

1. Thrifty Rent-A-Car System, Inc. and Pentastar Transportation Group, Inc.'s claims against Jeffrey Hinlein be dismissed with prejudice.

2. Jeffline Corporation, Bruce Hinlein, and Jeffrey Hinlein's claims against Thrifty Rent-A-Car System, Inc. and Pentastar Transportation Group, Inc. be dismissed with prejudice.

3. The parties waive all requirements of, and rights to, any findings of fact or conclusions of law with respect to the Judgment hereby agreed to be entered.

4. Bruce Hinlein and Jeffline Corporation waive all rights to appeal from the Judgment hereby agreed to be entered, and further waive any right to attempt to set aside, or contest the validity of, the Judgment in any proceeding in this or any other action or Court.

20376769

5. Judgment be entered in favor of Thrifty Rent-A-Car Systems and Pentastar Transportation Group, Inc. and against Bruce Hinlein and Jeffline Corporation, Inc. in the amount of $769,338.21.

6. Each party will bear its own costs.

Respectfully submitted,

CHAPEL, RIGGS, ABNEY NEAL & TURPEN
FRED RAHAL
502 West 6th Street
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SALLY D. GARR
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1667 K Street, NW, Suite 1100
Washington, DC 20006
(202) 887-0300

By: _____
Attorneys for Jeffline Corporation, Inc., Bruce Hinlein, and Jeffrey Hinlein

By: _____
Attorneys for Thrifty Rent-A-Car System, Inc. and Pentastar Transportation Group, Inc.

Dated: _____

Dated: 5-20-93

ORDER

Pursuant to the foregoing Stipulation, it is hereby ordered and adjudged that:

1. Thrifty Rent-A-Car System, Inc. and Pentastar Transportation Group, Inc.'s claims against Jeffrey Hinlein are hereby dismissed with prejudice.

2. Jeffline Corporation, Bruce Hinlein, and Jeffrey Hinlein's claims against Thrifty Rent-A-Car System, Inc. and Pentastar Transportation Group, Inc. are hereby dismissed with prejudice.

3. That judgment is hereby entered in favor of Thrifty Rent-A-Car System, Inc. and Pentastar Transportation Group, Inc. in the amount of $769,338.21.

4. Each party is to bear its own costs.

United States District Judge

20376769

DATE 27 1993

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. MILES TAYLOR a/k/a MILES L. TAYLOR; GEORGETTA TAYLOR; TULSA DEVELOPMENT AUTHORITY as Successor Trustee for the City of Tulsa, Oklahoma; PUBLIC SERVICE COMPANY OF OKLAHOMA; HILLCREST MEDICAL CENTER; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 92-C-693-B

FILED
MAY 24 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24 day of May, 1993. The Plaintiff appears by F.L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendant, County Treasurer, Tulsa County, Oklahoma, appears by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, appears not, having previously disclaimed any right, title or interest in the subject property; the Defendants, Tulsa Development Authority as Successor Trustee for the City of Tulsa, Oklahoma, and Public Service Company of Oklahoma, appear by their attorney, Doris L. Fransein; the Defendant, Hillcrest Medical Center, appears not, having previously filed its Disclaimer; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by its attorney

M. Diane Allbaugh; and the Defendants, Miles Taylor a/k/a Miles L. Taylor and Georgetta Taylor, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Miles Taylor a/k/a Miles L. Taylor, was served with Summons and Complaint on October 16, 1992; that the Defendant, Georgetta Taylor, was served with Summons and Complaint on October 16, 1992; that the Defendant, Tulsa Development Authority as Successor Trustee for the City of Tulsa, Oklahoma, acknowledged receipt of Summons and Complaint on August 27, 1992; that the Defendant, Public Service Company of Oklahoma, acknowledged receipt of Summons and Complaint on August 7, 1992; that the Defendant, Hillcrest Medical Center, acknowledged receipt of Summons and Complaint on August 18, 1992; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on August 7, 1992; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on August 10, 1992; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on August 10, 1992.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on September 2, 1992; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on September 2, 1992, disclaiming any right, title or interest in the subject property; that the Defendants, Tulsa Development Authority as Successor Trustee for the City of Tulsa, Oklahoma and Public Service Company of Oklahoma, filed

their Answer and Cross-Complaint on August 28, 1992; that the Defendant, Hillcrest Medical Center, filed its Disclaimer on August 18, 1992; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer, Counterclaim and Cross-Claim on August 26, 1992; and that the Defendants, Miles Taylor a/k/a Miles L. Taylor and Georgetta Taylor, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Twenty-two (22), Block Four (4), SUBURBAN ACRES ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the amended recorded plat thereof.

The Court further finds that on February 18, 1971, the Defendants, Miles Taylor and Georgetta Taylor, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $10,000.00, payable in monthly installments, with interest thereon at the rate of 4.5 percent (4.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Miles Taylor and Georgetta Taylor, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans

Affairs, now known as Secretary of Veterans Affairs, a mortgage dated February 18, 1971, covering the above-described property. Said mortgage was recorded on February 22, 1971, in Book 3957, Page 1088, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Miles Taylor and Georgetta Taylor, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Miles Taylor and Georgetta Taylor, are indebted to the Plaintiff in the principal sum of $4,823.67, plus interest at the rate of 4.5 percent per annum from June 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $6.96 for service of Summons and Complaint.

The Court further finds that the Defendants, Tulsa Development Authority as Successor Trustee for the City of Tulsa, Oklahoma, and Public Service Company of Oklahoma, have a lien on the property which is the subject matter of this action by virtue of an Assignment of Mortgage recorded in the records of Tulsa County, Oklahoma on September 13, 1988 in Book 5127 at Page 2054 and prays for a judgment in the amount of $6,500.00 together with interest at the judgment rate beginning June 1, 1991, reasonable attorney's fee in the sum of $975.00 and costs. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action by virtue of Income Tax Warrant No. ITI9001135100 in the amount of $54.79 issued July 26, 1990 and filed August 1, 1990; and Income Tax Warrant No. ITI 9001647500 in the amount of $60.70 issued December 4, 1990 and filed December 6, 1990, together with interest, penalties and costs. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of personal property taxes against Miles and Georgetta Taylor in the amount of $14.00 for tax year 1991 which became a lien on the property as of 6-26-92; the amount of $1.00 for tax year 1990 which became a lien on the property as of 6-20-91; and the amount of $2.00 for tax year 1987 which became a lien on the property as of 7-7-88 plus interest and costs. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, Hillcrest Medical Center, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, Miles Taylor and Georgetta Taylor, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Miles Taylor and Georgetta Taylor, in the principal sum of $4,823.67, plus interest at the rate of 4.5 percent per annum from June 1, 1991 until judgment, plus interest thereafter at the current legal rate of 3.25 percent per annum until paid, plus the costs of this action in the amount of $6.96 for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Tulsa Development Authority as Successor Trustee for the City of Tulsa, Oklahoma, and Public Service Company of Oklahoma, have and recover judgment in the amount of $6,500.00 together with interest at the judgment rate beginning June 1, 1991, reasonable attorney's fee in the sum of $975.00 and costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment by virtue of Income Tax Warrant No. ITI9001135100 in the amount of $54.79 issued July 26, 1990 and Income Tax Warrant No. ITI 9001647500 in the amount of $60.70 issued December 4, 1990, together with interest, penalties and costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment for personal property taxes against Miles and Georgetta Taylor in the amount of $14.00 for tax year 1991 which became a lien on the property as of 6-26-92; the amount of $1.00 for tax year 1990 which became a lien on the property as of 6-20-91; and the amount of $2.00 for tax year 1987 which became a lien on the property as of 7-7-88, plus interest and costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Miles Taylor, Georgetta Taylor, Hillcrest Medical Center, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Miles Taylor and Georgetta Taylor, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $2.00 for tax year 1987 for personal property taxes which became a lien on the property on July 7, 1988;

Fourth:

In payment of Defendants, Tulsa Development Authority as Successor Trustee for the City of Tulsa, Oklahoma and Public Service Company of Oklahoma in the amount of $6,500.00 together with interest at the judgment rate beginning June 1, 1991, reasonable attorney's fee in the sum of $975.00 and costs.

Fifth:

In payment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission for Income Tax Warrant No.ITI9001135100 in the amount of $54.79, filed August 1, 1990; and Income Tax Warrant No. ITI9001647500 in the amount of $60.70, filed December 6, 1990, together with interest, penalties and costs.

Sixth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, for personal property taxes in the amount of $1.00 for tax year 1990 which became a lien on the property as of June 20, 1991; and in the amount of $14.00 for tax year 1991 which became a lien on the property as of June 26, 1992.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

F.L. DUNN, III
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. Dennis Semler

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendant,
County Treasurer, Tulsa County, Oklahoma

Doris L Fransein

DORIS L. FRANSEIN, OBA #3000
Attorney for Defendants,
Tulsa Development Authority
as Successor Trustee for the City of Tulsa, Oklahoma
and Public Service Company of Oklahoma

K D Allbaugh OBA 14175 for

M. DIANE ALLBAUGH, OBA #14667
Attorney for Defendant,
State of Oklahoma ex rel. Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 92-C-693-B

KBA/esr

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN BRYAN, et al,

Plaintiffs,

v.

JIM DONN MANLEY, et al,

Defendants.

92-C-0029-B
92-C-30-B
92-C-137-B
92-C-138-B

ORDER

In 1990, a state court jury awarded John and Deborah Bryan ("Appellees") $36,620.36 in actual damages, $76,630.57 in punitive damages and $54,148.50 in attorney fees against Jim Donn Manley and John L. Houchin ("Appellants"). Appellants then filed for bankruptcy protection, arguing that the state court judgment be discharged.

The Bankruptcy Court ruled against Appellants, finding the judgment to be nondischargeable. Appellants now appeal, asserting three issues: (1) Whether collateral estoppel was properly applied; (2) Whether the Bankruptcy Court erred in finding that punitive damages awarded under the Oklahoma Construction Trust Statutes are nondischargeable under 11 U.S.C. § 523(a)(4); and (3) Whether the Bankruptcy Court erred in finding Appellants' action constituted defalcation while acting in a fiduciary capacity.

For the reasons listed below, the Bankruptcy Court's decision is **affirmed.**

I. Summary of Facts/Procedural History

In September 1985, Appellees contracted with Watkins Construction Company

("Watkins") to remodel their Tulsa home.[1] The contract called for Appellees to pay Watkins $119,325.00. Based on the work Watkins completed, Appellees paid Watkins $106,500. Of that, Watkins paid $64,869.43 to subcontractors who worked on or provided supplies for the remodeling. The remaining $41,630.57 was kept by Watkins, although the company still owed money to unpaid subcontractors.

Appellees then chose to directly pay some of those subcontractors who had not yet been paid. Some of these subcontractors had filed lien statements and some had not. The subcontractor with the largest claim filed an action to foreclose his lien statement in Tulsa County District Court against the Appellees. Appellees successfully defended on the basis that the lien was unenforceable.

Subsequently, on November 13, 1986, Appellees filed suit in the Tulsa County District Court (the "State Court") against Watkins, seeking actual and punitive damages for what they believed to be a violation of the Oklahoma Construction Trust Statutes. A jury later awarded Appellees $36,620.36 in actual damages, $76,630.57 in punitive damages and $54,148.50 for attorney fees.

After the state court judgment, Appellants filed a voluntary Petition for Bankruptcy. Once the bankruptcy Petition was filed, Appellees sought to prevent Appellants from discharging the judgment. Summary judgment motions were filed by both parties on the dischargeability issue.

On January 3, 1992, the Bankruptcy Court denied Manleys' Motion for Summary Judgment. On February 6, 1993, the Bankruptcy Court granted Appellees' Motion For

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[1] *Prior to September of 1985, Houchin owned 1/3 of the stock and was an officer and director of Watkins Construction Company ("Watkins"). Manley also owned 1/3 of the stock and was an officer and director of Watkins.*

Summary Judgment. The net effect of the ruling was that the state court judgment could not be discharged.[2] Appellants now appeal the Bankruptcy Court's decision.

II. Legal Analysis

Appellants assert the following errors by the Bankruptcy Court: (1) The court erred in its application of collateral estoppel; (2) The court erred in finding that punitive damages awarded under the Oklahoma Construction Trust Statutes can be nondischargeable under 11 U.S.C. § 523(a)(4); and (3) The court erred in finding Appellants' action constituted defalcation while acting in a fiduciary capacity. Each issue will be discussed below.

A. The Collateral Estoppel Issue

The Bankruptcy Court found that the Appellees' judgment against Appellants was not dischargeable under 11 U.S.C. §523(a)(4).[3] The Bankruptcy Court applied the doctrine of collateral estoppel, concluding that the state court found evidence of misconduct. This finding, reasoned the Bankruptcy Court, prevented it from re-litigating the factual issue of whether Appellants' committed "fraud or defalcation while acting in a fiduciary capacity." The Bankruptcy Court determined that the requirements for §523(a)(4) were met, and the judgment was not dischargeable.[4]

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[2] *Appellants appealed the decision of the state court. However, on November 10, 1992 the Oklahoma Supreme Court denied certiorari. See, Defendants' Notice (docket #16).*

[3] *11 U.S.C. §523(a)(4) reads: A discharge under section 727 does not discharge an individual debtor from any debt...for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny(emphasis added).*

[4] *The Bankruptcy Court relied, in part on 23 O.S. §9(A), which reads: "In any action for the breach of an obligation not arising from contract...[where] there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may [award punitive damages larger than the actual damage award.] Applying that statute, the Bankruptcy Court wrote: "The state court judgment...did award punitive damages..."exceeding the amount of actual damages [quoting 23 O.S. §9(A)]." If this award was made pursuant to...23 O.S. §9(A), then the State court judge must have determined that [there was evidence] of misconduct.(emphasis added). It should be noted that it is unclear from the record whether 23 O.S. §9(A) was*

The first issue is whether the Bankruptcy Court properly applied the doctrine of collateral estoppel. The Bankruptcy Court is collaterally estopped if (1) the issue to be precluded is the same as that involved in the prior state action; (2) the issue was actually litigated by the parties; and (3) the state court's determination of the issue was necessary to the resulting final and valid judgment. *In Re Wallace*, 840 F.2d 762, 765 (10th Cir. 1988).

The central question in this appeal focuses on whether the issue is the same one decided in the state court judgment. The issue arises under §523(a)(4): Did Appellants commit "defalcation while acting in a fiduciary capacity?"

The state court jury found that Appellants violated 42 O.S. §§152 and 153.[5] Those statutes create a trust for funds paid to Appellants for the remodeling contract. The jury found that Appellants violated the statutes because the payments received by Watkins were diverted to "a purpose other than payment of valid lienable claims." In other words, Watkins did not pay all of its subcontractors; instead, Appellants took part of Appellees' money and used it for something else.

Therefore, the issue boils down to whether the facts underlying the violation of §§152 and 153 deal with the same issue as determining whether Appellants committed "defalcation while acting in a fiduciary capacity?".

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that [there was evidence] of misconduct (emphasis added). It should be noted that it is unclear from the record whether 23 O.S. §9(A) was the basis for the jury instructions.

[5] *The pertinent part of §152 states: "The amount payable under any building or remodeling contract shall, upon receipt by any contractor or subcontractor, be held as trust funds for the payment of all lienable claims due and owing or to become due and owing...by reason of such building or remodeling contract." §153 states: "The trust funds created under Section 152 of this title shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims...have been paid." Section 153 also states that managing officers of corporations shall be liable for the proper application of such trust funds.*

A defalcation exists where "even the merest deficit" is caused by the debtor's misconduct, even if the conduct does not benefit him. *In Re Crosswhite,* 91 B.R. 156, 160 (bankr. M.D. Fla. 1988).[6] Appellants engaged in misconduct by not paying some of the subcontractors. Furthermore, by reason of the statutory trust established by operation of §§152 and §153, Appellants were acting in a fiduciary capacity. *In Re Geer, 137 B.R. 37,40 (Bankr. W.D. Mo. 1991).* Consequently, the issues in the state court judgment are the same as the ones underlying a determination of dischargeability under 11 U.S.C. § 523(a)(4).[7] In addition, the other two elements of collateral estoppel are met. Therefore, the doctrine of collateral estoppel applies.

B. Should Punitive Damages Awarded Under the Oklahoma Construction Trust Statutes Be Discharged under 11 U.S.C. § 523(a)(4)?

As discussed above, the actual damages and attorney fees awarded in the state court judgment should not be discharged pursuant to §523(a)(4).[8] However, Appellants maintain that §523(a)(4) does not support the Bankruptcy Court's finding that punitive damages are nondischargeable.

Two questions surface on this issue. First, as a general rule, should punitive damages be nondischargeable? Second, given the facts of this case, did the Bankruptcy Court err in refusing to discharge the punitive damage award from the state court

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[6] *Defalcation does not require the level of wrongdoing necessary for fraud or embezzlement. In Re Boudakian, 137 B.R. 89, 94 (Bankr. R.I. 1992).*

[7] *This Court also affirms the Bankruptcy Court's decision regarding Appellants' third issue. Wrote the Bankruptcy Court: "The Court concludes that mere failure to give notice of the possibility of liens...does not cancel a contractor's fiduciary duty to hold trust funds pursuant to...§§152,153." The Bankruptcy Court also properly wrote: "Whether the liens ultimately proved enforceable or not is beside the point: trust funds were still received, they were still misapplied, and such misapplication still caused damage to the Bryans."*

[8] *Appellants argue that dischargeability of punitive damages should be governed by 11 U.S.C. §523(a)(6) as opposed to 11 U.S.C. §523(a)(4). This Court disagrees.*

judgment?

Courts are divided in respect to the first question. However, this Court relies, in part, on a Tenth Circuit case that did not disturb a bankruptcy court's decision that punitive damages were nondischargeable.

In Re Wallace[9] arose after a New Mexico state court awarded both compensatory and punitive damages against the debtor on fraud and conversion claims. The Bankruptcy Court found the New Mexico judgment nondischargeable under §523(a)(4) and (6), and the Tenth Circuit affirmed.[10]

In Re Dahlstrom[11] also discusses nondischargeability as regards punitive damages. The Court concluded that a majority of courts addressing the issue have held such damages to be nondischargeable either as a general rule or depending on the circumstances of a specific case. While the case centered on an interpretation of 11 U.S.C. §523(a)(6), it is nevertheless persuasive. Therefore, as a general rule, punitive damages can be held to be nondischargeable.

The second question is whether, under the circumstances of this case, the Bankruptcy Court erred in finding the punitive damages award to be nondischargeable. Again, courts are divided on the issue; however, the analysis in *In Re Scheuer*, 125 B.R. 584 (Bkrtcy.C.D.Cal. 1991) is helpful. *In Re Scheuer* dealt with whether punitive damages should be discharged under §523(a)(4). Wrote the court:

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[9] *840 F.2d 762 (10th Cir. 1988).*

[10] *While the issue of whether punitive damages were dischargeable was not discussed, this Court finds it significant that the Tenth Circuit allowed the ruling to stand.*

[11] *129 B.R. 240 (Bankr. D.Utah 1991).*

> **The bankruptcy court is a court of equity. The bankruptcy judge, therefore, should have the power to review all the facts and circumstances relating to the judgment and decide whether the penalty element should be nondischargeable along with the compensatory element. Some factors the judge might consider included (1) the extent to which the acts causing the liability were willful and malicious, (2) the debtor's culpability, (3) the extent to which the compensatory element adequately redresses the wrong done to the claimant, (4) the legal and factual justification for the penalty and (5) the impact on the penalty on debtor's ability to achieve a fresh start.**

In this case, the first factor to be considered is whether the actions complained of were found to be willful and malicious. Appellants argue that no such finding was made by the state court. However, a statement from the trial court is persuasive in answering this question:

> **It is obvious to the Court that your clients, the two principals [Appellants], totally disregarded the statute...They commingled the funds. They left large amounts of claims that were...not paid, putting the entire obligation of those on the homeowner...The Court feels in situations like this, malice and ill-will and disregard, certainly can be presumed if one just disregards the statute as both of your clients have done in this case.** *Volume II of Trial Transcript, page 400, lines 12-21.*[12]

Second, Appellants were culpable. The facts show that Appellees paid them $106,500 on the remodeling contract. Of that, Watkins paid $64,869.43 to subcontractors, leaving $41,630.57. Instead of taking that money and paying the remaining subcontractor bills, Appellants used it for other purposes.

Third, the record is hazy concerning whether the actual damages awarded to Appellees adequately redressed the wrong done, although specific facts are not offered on that point.

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[12] *The trial transcript was not originally designated as a part of the Appellate record. However, both parties agreed to designate it as part of the record prior to the opinion.*

The fourth factor, however, is decisive in favor of Appellees. The state court first found that Appellants violated 42 O.S. §§152 and 153. Then, by imposing punitive damages, the court found the conduct to either be gross negligence or **"evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed."**[13] Furthermore, by assessing punitive damages, the state court punished Appellants and/or sent a warning to other construction companies regarding violation of §§152 and 153. This takes on greater significance because such a penalty is supported by strong public policy.[14] Consequently, a strong legal and factual justification for the penalty existed.

Little examination of the fifth factor is needed. The record suggests that Appellants should not be aided by the "fresh start" philosophy of the Bankruptcy Act.[15] Therefore, after examining the five factors, the Court finds the Bankruptcy Court did not err on this issue.

III. Conclusion

The state court found that Appellants violated 42 O.S. §§152 and 153 by violating their fiduciary duty to a construction trust. The state court also found Appellants' conduct to merit punitive damages. Those findings invoke the doctrine of collateral estoppel, and,

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[13] *Gross negligence is taken from the jury instructions. The rest of the language appears both in the jury instructions and in 23 O.S. §9(A).*

[14] *There is a strong public policy argument behind §§ 152 and 153. The statutes are used as a trust device to prevent the use of construction-generated funds for any other purpose other than payment of valid lienable claims. These sections "safeguard the rights of lien claimants on the job" and "protect an owner, contractor, subcontractor or other beneficiary from exposure in excess of the contract limit." Sandpiper North Apartments v. American National Bank, 680 P.2d 983, 987 (Okla. 1984).*

[15] *It should be noted that the Supreme Court has stated that the Bankruptcy Act "limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor". Grogan v. Garner, 111 S.Ct. 654, 659 (1991)(emphasis added). Based on the record, Appellants do not fit into this category.*

as a result, the Bankruptcy Court did not err in finding that actual damages and attorney fees were nondischargeable under 11 U.S.C. §523(a)(4).

Furthermore, the Bankruptcy Court did not err in finding the award of punitive damages by the state court to be nondischargeable under 11 U.S.C. §523(a)(4). Accordingly, given the facts of this case, and the findings of the state court, punitive damages should not be discharged. Therefore, the Bankruptcy Court's decision is **AFFIRMED.**

SO ORDERED THIS 26th day of May, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FREDDA PERRY MONROE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 92-C-524-B
	)	
STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, HISSOM MEMORIAL CENTER,	)	
	)	
Defendant.	)	

JOINT STIPULATION ~~FOR~~ OF DISMISSAL WITH PREJUDICE

Plaintiff, Fredda Perry Monroe, and Defendant, State of Oklahoma, ex rel. Department of Human Services, Hissom Memorial Center, stipulate that the above styled and numbered cause be dismissed with prejudice, with each party to bear its own costs and attorney fees.

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Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE O'BANNON BANKING COMPANY,

Plaintiff,

v.

ZINKLAHOMA, INC., formerly JOHN ZINK COMPANY, and THE FIRST NATIONAL BANK IN DOLTON,

Defendants,

v.

RMP CONSULTING GROUP, INC.,

Third-Party Defendant, and Third-Party Plaintiff,

v.

RMP SERVICE GROUP, INC., and KOCH ENGINEERING COMPANY, INC.,

Third-Party Defendants.

Case No. 90-C-987-E

AGREED JUDGMENT AGAINST SOUTH HOLLAND TRUST AND SAVINGS BANK, FORMERLY THE FIRST NATIONAL BANK IN DOLTON

On May 26, 1993 the Court has for consideration the oral stipulation of the parties regarding judgment in this action as to the claims of South Holland Trust and Savings Bank, formerly The First National Bank in Dolton ("Dolton"). Based upon the stipulation of the parties, the Court finds that the document upon which Dolton bases its claims against the other parties in this action does not contain an original signature of the representative of The John Zink Company, is a forgery, and is void and ineffective

as an obligation of The John Zink Company or Koch Engineering Company and therefore judgment should be rendered denying Dolton's claims against all parties in this action.

IT IS THEREFORE ORDERED that all claims and demands of Dolton against any and all parties in this action are hereby denied with all parties bearing their own attorney fees and costs with respect to such claims.

JAMES O. ELLISON
UNITED STATE DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MCI TELECOMMUNICATIONS CORPORATION, Plaintiff, v. LEON NASH, DOING BUSINESS AS JACKSON NASH FUNERAL HOME, Defendant.	Civil Action No. 93-C-0214B

DEFAULT JUDGMENT

This matter comes before the Court upon Plaintiff MCI Telecommunications Corporation's Motion for Default Judgment. It appears that defendant Leon Nash is in default and that the Clerk of the United States District Court has searched the records and entered the default of defendant Leon Nash. It appears from the Declaration of Jeff Kintzel in support of Plaintiff's Application for Entry of Default that defendant Leon Nash is indebted to the Plaintiff in the amount of Fifteen Thousand One Hundred Seventy-Nine and 43/100 Dollars ($15,179.43).

In accord with the Entry of Default, the Court hereby enters Judgment in favor of the Plaintiff, MCI Telecommunications Corporation, and against Leon Nash, for the amount of Fifteen Thousand One Hundred Seventy-Nine and 43/100 ($15,179.43), plus post-judgment interest at a rate of 3.25 % per annum from the date of judgment until paid. Costs and attorney's fees may be awarded upon proper application pursuant to Local Rule 6.

Dated this 24 day of May, 1993.

S/ THOMAS R. BRETT

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN BRYAN, et al,

Plaintiffs,

v.

JIM DONN MANLEY, et al,

Defendants.

92-C-0029-B

ORDER

In 1990, a state court jury awarded John and Deborah Bryan ("Appellees") $36,620.36 in actual damages, $76,630.57 in punitive damages and $54,148.50 in attorney fees against Jim Donn Manley and John L. Houchin ("Appellants"). Appellants then filed for bankruptcy protection, arguing that the state court judgment be discharged.

The Bankruptcy Court ruled against Appellants, finding the judgment to be nondischargeable. Appellants now appeal, asserting three issues: (1) Whether collateral estoppel was properly applied; (2) Whether the Bankruptcy Court erred in finding that punitive damages awarded under the Oklahoma Construction Trust Statutes are nondischargeable under 11 U.S.C. § 523(a)(4); and (3) Whether the Bankruptcy Court erred in finding Appellants' action constituted defalcation while acting in a fiduciary capacity.

For the reasons listed below, the Bankruptcy Court's decision is **affirmed.**

I. Summary of Facts/Procedural History

In September 1985, Appellees contracted with Watkins Construction Company

("Watkins") to remodel their Tulsa home.[1] The contract called for Appellees to pay Watkins $119,325.00. Based on the work Watkins completed, Appellees paid Watkins $106,500. Of that, Watkins paid $64,869.43 to subcontractors who worked on or provided supplies for the remodeling. The remaining $41,630.57 was kept by Watkins, although the company still owed money to unpaid subcontractors.

Appellees then chose to directly pay some of those subcontractors who had not yet been paid. Some of these subcontractors had filed lien statements and some had not. The subcontractor with the largest claim filed an action to foreclose his lien statement in Tulsa County District Court against the Appellees. Appellees successfully defended on the basis that the lien was unenforceable.

Subsequently, on November 13, 1986, Appellees filed suit in the Tulsa County District Court (the "State Court") against Watkins, seeking actual and punitive damages for what they believed to be a violation of the Oklahoma Construction Trust Statutes. A jury later awarded Appellees $36,620.36 in actual damages, $76,630.57 in punitive damages and $54,148.50 for attorney fees.

After the state court judgment, Appellants filed a voluntary Petition for Bankruptcy. Once the bankruptcy Petition was filed, Appellees sought to prevent Appellants from discharging the judgment. Summary judgment motions were filed by both parties on the dischargeability issue.

On January 3, 1992, the Bankruptcy Court denied Manleys' Motion for Summary Judgment. On February 6, 1993, the Bankruptcy Court granted Appellees' Motion For

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[1] *Prior to September of 1985, Houchin owned 1/3 of the stock and was an officer and director of Watkins Construction Company ("Watkins"). Manley also owned 1/3 of the stock and was an officer and director of Watkins.*

Summary Judgment. The net effect of the ruling was that the state court judgment could not be discharged.[2] Appellants now appeal the Bankruptcy Court's decision.

II. Legal Analysis

Appellants assert the following errors by the Bankruptcy Court: (1) The court erred in its application of collateral estoppel; (2) The court erred in finding that punitive damages awarded under the Oklahoma Construction Trust Statutes can be nondischargeable under 11 U.S.C. § 523(a)(4); and (3) The court erred in finding Appellants' action constituted defalcation while acting in a fiduciary capacity. Each issue will be discussed below.

A. The Collateral Estoppel Issue

The Bankruptcy Court found that the Appellees' judgment against Appellants was not dischargeable under 11 U.S.C. §523(a)(4).[3] The Bankruptcy Court applied the doctrine of collateral estoppel, concluding that the state court found evidence of misconduct. This finding, reasoned the Bankruptcy Court, prevented it from re-litigating the factual issue of whether Appellants' committed "fraud or defalcation while acting in a fiduciary capacity." The Bankruptcy Court determined that the requirements for §523(a)(4) were met, and the judgment was not dischargeable.[4]

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[2] *Appellants appealed the decision of the state court. However, on November 10, 1992 the Oklahoma Supreme Court denied certiorari. See, Defendants' Notice (docket #16).*

[3] *11 U.S.C. §523(a)(4) reads: A discharge under section 727 does not discharge an individual debtor from any debt...for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny(emphasis added).*

[4] *The Bankruptcy Court relied, in part on 23 O.S. §9(A), which reads: "In any action for the breach of an obligation not arising from contract...[where] there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may [award punitive damages larger than the actual damage award.] Applying that statute, the Bankruptcy Court wrote: "The state court judgment...did award punitive damages..."exceeding the amount of actual damages [quoting 23 O.S. §9(A)]." If this award was made pursuant to...23 O.S. §9(A), then the State court judge must have determined that [there was evidence] of misconduct.(emphasis added). It should be noted that it is unclear from the record whether 23 O.S. §9(A) was*

The first issue is whether the Bankruptcy Court properly applied the doctrine of collateral estoppel. The Bankruptcy Court is collaterally estopped if (1) the issue to be precluded is the same as that involved in the prior state action; (2) the issue was actually litigated by the parties; and (3) the state court's determination of the issue was necessary to the resulting final and valid judgment. *In Re Wallace*, 840 F.2d 762, 765 (10th Cir. 1988).

The central question in this appeal focuses on whether the issue is the same one decided in the state court judgment. The issue arises under §523(a)(4): Did Appellants commit "defalcation while acting in a fiduciary capacity?"

The state court jury found that Appellants violated 42 O.S. §§152 and 153.[5] Those statutes create a trust for funds paid to Appellants for the remodeling contract. The jury found that Appellants violated the statutes because the payments received by Watkins were diverted to "a purpose other than payment of valid lienable claims." In other words, Watkins did not pay all of its subcontractors; instead, Appellants took part of Appellees' money and used it for something else.

Therefore, the issue boils down to whether the facts underlying the violation of §§152 and 153 deal with the same issue as determining whether Appellants committed "defalcation while acting in a fiduciary capacity?".

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that [there was evidence] of misconduct.(emphasis added). It should be noted that it is unclear from the record whether 23 O.S. §9(A) was the basis for the jury instructions.

[5] *The pertinent part of §152 states: "The amount payable under any building or remodeling contract shall, upon receipt by any contractor or subcontractor, be held as trust funds for the payment of all lienable claims due and owing or to become due and owing...by reason of such building or remodeling contract." §153 states: "The trust funds created under Section 152 of this title shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims...have been paid." Section 153 also states that managing officers of corporations shall be liable for the proper application of such trust funds.*

A defalcation exists where "even the merest deficit" is caused by the debtor's misconduct, even if the conduct does not benefit him. *In Re Crosswhite,* 91 B.R. 156, 160 (bankr. M.D. Fla. 1988).[6] Appellants engaged in misconduct by not paying some of the subcontractors. Furthermore, by reason of the statutory trust established by operation of §§152 and §153, Appellants were acting in a fiduciary capacity. *In Re Geer, 137 B.R. 37,40 (Bankr. W.D. Mo. 1991).* Consequently, the issues in the state court judgment are the same as the ones underlying a determination of dischargeability under 11 U.S.C. § 523(a)(4).[7] In addition, the other two elements of collateral estoppel are met. Therefore, the doctrine of collateral estoppel applies.

B. Should Punitive Damages Awarded Under the Oklahoma Construction Trust Statutes Be Discharged under 11 U.S.C. § 523(a)(4)?

As discussed above, the actual damages and attorney fees awarded in the state court judgment should not be discharged pursuant to §523(a)(4).[8] However, Appellants maintain that §523(a)(4) does not support the Bankruptcy Court's finding that punitive damages are nondischargeable.

Two questions surface on this issue. First, as a general rule, should punitive damages be nondischargeable? Second, given the facts of this case, did the Bankruptcy Court err in refusing to discharge the punitive damage award from the state court

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[6] *Defalcation does not require the level of wrongdoing necessary for fraud or embezzlement. In Re Boudakian, 137 B.R. 89, 94 (Bankr. R.I. 1992).*

[7] *This Court also affirms the Bankruptcy Court's decision regarding Appellants' third issue. Wrote the Bankruptcy Court: "The Court concludes that mere failure to give notice of the possibility of liens...does not cancel a contractor's fiduciary duty to hold trust funds pursuant to...§§152,153." The Bankruptcy Court also properly wrote: "Whether the liens ultimately proved enforceable or not is beside the point: trust funds were still received, they were still misapplied, and such misapplication still caused damage to the Bryans."*

[8] *Appellants argue that dischargeability of punitive damages should be governed by 11 U.S.C. §523(a)(6) as opposed to 11 U.S.C. §523(a)(4). This Court disagrees.*

judgment?

Courts are divided in respect to the first question. However, this Court relies, in part, on a Tenth Circuit case that did not disturb a bankruptcy court's decision that punitive damages were nondischargeable.

In Re Wallace[9] arose after a New Mexico state court awarded both compensatory and punitive damages against the debtor on fraud and conversion claims. The Bankruptcy Court found the New Mexico judgment nondischargeable under §523(a)(4) and (6), and the Tenth Circuit affirmed.[10]

In Re Dahlstrom[11] also discusses nondischargeability as regards punitive damages. The Court concluded that a majority of courts addressing the issue have held such damages to be nondischargeable either as a general rule or depending on the circumstances of a specific case. While the case centered on an interpretation of 11 U.S.C. §523(a)(6), it is nevertheless persuasive. Therefore, as a general rule, punitive damages can be held to be nondischargeable.

The second question is whether, under the circumstances of this case, the Bankruptcy Court erred in finding the punitive damages award to be nondischargeable. Again, courts are divided on the issue; however, the analysis in *In Re Scheuer*, 125 B.R. 584 (Bkrtcy.C.D.Cal. 1991) is helpful. *In Re Scheuer* dealt with whether punitive damages should be discharged under §523(a)(4). Wrote the court:

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[9] *840 F.2d 762 (10th Cir. 1988).*

[10] *While the issue of whether punitive damages were dischargeable was not discussed, this Court finds it significant that the Tenth Circuit allowed the ruling to stand.*

[11] *129 B.R. 240 (Bankr. D.Utah 1991).*

> **The bankruptcy court is a court of equity. The bankruptcy judge, therefore, should have the power to review all the facts and circumstances relating to the judgment and decide whether the penalty element should be nondischargeable along with the compensatory element. Some factors the judge might consider included (1) the extent to which the acts causing the liability were willful and malicious, (2) the debtor's culpability, (3) the extent to which the compensatory element adequately redresses the wrong done to the claimant, (4) the legal and factual justification for the penalty and (5) the impact on the penalty on debtor's ability to achieve a fresh start.**

In this case, the first factor to be considered is whether the actions complained of were found to be willful and malicious. Appellants argue that no such finding was made by the state court. However, a statement from the trial court is persuasive in answering this question:

> **It is obvious to the Court that your clients, the two principals [Appellants], totally disregarded the statute...They commingled the funds. They left large amounts of claims that were...not paid, putting the entire obligation of those on the homeowner...The Court feels in situations like this, malice and ill-will and disregard, certainly can be presumed if one just disregards the statute as both of your clients have done in this case.** *Volume II of Trial Transcript, page 400, lines 12-21.*[12]

Second, Appellants were culpable. The facts show that Appellees paid them $106,500 on the remodeling contract. Of that, Watkins paid $64,869.43 to subcontractors, leaving $41,630.57. Instead of taking that money and paying the remaining subcontractor bills, Appellants used it for other purposes.

Third, the record is hazy concerning whether the actual damages awarded to Appellees adequately redressed the wrong done, although specific facts are not offered on that point.

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[12] *The trial transcript was not originally designated as a part of the Appellate record. However, both parties agreed to designate it as part of the record prior to the opinion.*

The fourth factor, however, is decisive in favor of Appellees. The state court first found that Appellants violated 42 O.S. §§152 and 153. Then, by imposing punitive damages, the court found the conduct to either be gross negligence or **"evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed."**[13] Furthermore, by assessing punitive damages, the state court punished Appellants and/or sent a warning to other construction companies regarding violation of §§152 and 153. This takes on greater significance because such a penalty is supported by strong public policy.[14] Consequently, a strong legal and factual justification for the penalty existed.

Little examination of the fifth factor is needed. The record suggests that Appellants should not be aided by the "fresh start" philosophy of the Bankruptcy Act.[15] Therefore, after examining the five factors, the Court finds the Bankruptcy Court did not err on this issue.

III. Conclusion

The state court found that Appellants violated 42 O.S. §§152 and 153 by violating their fiduciary duty to a construction trust. The state court also found Appellants' conduct to merit punitive damages. Those findings invoke the doctrine of collateral estoppel, and,

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[13] *Gross negligence is taken from the jury instructions. The rest of the language appears both in the jury instructions and in 23 O.S. §9(A).*

[14] *There is a strong public policy argument behind §§ 152 and 153. The statutes are used as a trust device to prevent the use of construction-generated funds for any other purpose other than payment of valid lienable claims. These sections "safeguard the rights of lien claimants on the job" and "protect an owner, contractor, subcontractor or other beneficiary from exposure in excess of the contract limit." Sandpiper North Apartments v. American National Bank, 680 P.2d 983, 987 (Okla. 1984).*

[15] *It should be noted that the Supreme Court has stated that the Bankruptcy Act "limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor". Grogan v. Garner, 111 S.Ct. 654, 659 (1991)(emphasis added). Based on the record, Appellants do not fit into this category.*

as a result, the Bankruptcy Court did not err in finding that actual damages and attorney fees were nondischargeable under 11 U.S.C. §523(a)(4).

Furthermore, the Bankruptcy Court did not err in finding the award of punitive damages by the state court to be nondischargeable under 11 U.S.C. §523(a)(4). Accordingly, given the facts of this case, and the findings of the state court, punitive damages should not be discharged. Therefore, the Bankruptcy Court's decision is **AFFIRMED.**

SO ORDERED THIS 26th day of May, 1993.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN BRYAN, et al,

Plaintiffs,

v.

JIM DONN MANLEY, et al,

Defendants.

92-C-0029-B
92-C-030-B

ORDER

In 1990, a state court jury awarded John and Deborah Bryan ("Appellees") $36,620.36 in actual damages, $76,630.57 in punitive damages and $54,148.50 in attorney fees against Jim Donn Manley and John L. Houchin ("Appellants"). Appellants then filed for bankruptcy protection, arguing that the state court judgment be discharged.

The Bankruptcy Court ruled against Appellants, finding the judgment to be nondischargeable. Appellants now appeal, asserting three issues: (1) Whether collateral estoppel was properly applied; (2) Whether the Bankruptcy Court erred in finding that punitive damages awarded under the Oklahoma Construction Trust Statutes are nondischargeable under 11 U.S.C. § 523(a)(4); and (3) Whether the Bankruptcy Court erred in finding Appellants' action constituted defalcation while acting in a fiduciary capacity.

For the reasons listed below, the Bankruptcy Court's decision is **affirmed.**

I. Summary of Facts/Procedural History

In September 1985, Appellees contracted with Watkins Construction Company

("Watkins") to remodel their Tulsa home.[1] The contract called for Appellees to pay Watkins $119,325.00. Based on the work Watkins completed, Appellees paid Watkins $106,500. Of that, Watkins paid $64,869.43 to subcontractors who worked on or provided supplies for the remodeling. The remaining $41,630.57 was kept by Watkins, although the company still owed money to unpaid subcontractors.

Appellees then chose to directly pay some of those subcontractors who had not yet been paid. Some of these subcontractors had filed lien statements and some had not. The subcontractor with the largest claim filed an action to foreclose his lien statement in Tulsa County District Court against the Appellees. Appellees successfully defended on the basis that the lien was unenforceable.

Subsequently, on November 13, 1986, Appellees filed suit in the Tulsa County District Court (the "State Court") against Watkins, seeking actual and punitive damages for what they believed to be a violation of the Oklahoma Construction Trust Statutes. A jury later awarded Appellees $36,620.36 in actual damages, $76,630.57 in punitive damages and $54,148.50 for attorney fees.

After the state court judgment, Appellants filed a voluntary Petition for Bankruptcy. Once the bankruptcy Petition was filed, Appellees sought to prevent Appellants from discharging the judgment. Summary judgment motions were filed by both parties on the dischargeability issue.

On January 3, 1992, the Bankruptcy Court denied Manleys' Motion for Summary Judgment. On February 6, 1993, the Bankruptcy Court granted Appellees' Motion For

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[1] *Prior to September of 1985, Houchin owned 1/3 of the stock and was an officer and director of Watkins Construction Company ("Watkins"). Manley also owned 1/3 of the stock and was an officer and director of Watkins.*

Summary Judgment. The net effect of the ruling was that the state court judgment could not be discharged.[2] Appellants now appeal the Bankruptcy Court's decision.

II. Legal Analysis

Appellants assert the following errors by the Bankruptcy Court: (1) The court erred in its application of collateral estoppel; (2) The court erred in finding that punitive damages awarded under the Oklahoma Construction Trust Statutes can be nondischargeable under 11 U.S.C. § 523(a)(4); and (3) The court erred in finding Appellants' action constituted defalcation while acting in a fiduciary capacity. Each issue will be discussed below.

A. The Collateral Estoppel Issue

The Bankruptcy Court found that the Appellees' judgment against Appellants was not dischargeable under 11 U.S.C. §523(a)(4).[3] The Bankruptcy Court applied the doctrine of collateral estoppel, concluding that the state court found evidence of misconduct. This finding, reasoned the Bankruptcy Court, prevented it from re-litigating the factual issue of whether Appellants' committed "fraud or defalcation while acting in a fiduciary capacity." The Bankruptcy Court determined that the requirements for §523(a)(4) were met, and the judgment was not dischargeable.[4]

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[2] *Appellants appealed the decision of the state court. However, on November 10, 1992 the Oklahoma Supreme Court denied certiorari. See, Defendants' Notice (docket #16).*

[3] *11 U.S.C. §523(a)(4) reads: A discharge under section 727 does not discharge an individual debtor from any debt...for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny(emphasis added).*

[4] *The Bankruptcy Court relied, in part on 23 O.S. §9(A), which reads: "In any action for the breach of an obligation not arising from contract...[where] there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may [award punitive damages larger than the actual damage award.] Applying that statute, the Bankruptcy Court wrote: "The state court judgment...did award punitive damages..."exceeding the amount of actual damages [quoting 23 O.S. §9(A)]." If this award was made pursuant to...23 O.S. §9(A), then the State court judge must have determined that [there was evidence] of misconduct.(emphasis added). It should be noted that it is unclear from the record whether 23 O.S. §9(A) was*

The first issue is whether the Bankruptcy Court properly applied the doctrine of collateral estoppel. The Bankruptcy Court is collaterally estopped if (1) the issue to be precluded is the same as that involved in the prior state action; (2) the issue was actually litigated by the parties; and (3) the state court's determination of the issue was necessary to the resulting final and valid judgment. *In Re Wallace*, 840 F.2d 762, 765 (10th Cir. 1988).

The central question in this appeal focuses on whether the issue is the same one decided in the state court judgment. The issue arises under §523(a)(4): Did Appellants commit "defalcation while acting in a fiduciary capacity?"

The state court jury found that Appellants violated 42 O.S. §§152 and 153.[5] Those statutes create a trust for funds paid to Appellants for the remodeling contract. The jury found that Appellants violated the statutes because the payments received by Watkins were diverted to "a purpose other than payment of valid lienable claims." In other words, Watkins did not pay all of its subcontractors; instead, Appellants took part of Appellees' money and used it for something else.

Therefore, the issue boils down to whether the facts underlying the violation of §§152 and 153 deal with the same issue as determining whether Appellants committed "defalcation while acting in a fiduciary capacity?".

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that [there was evidence] of misconduct.(emphasis added). It should be noted that it is unclear from the record whether 23 O.S. §9(A) was the basis for the jury instructions.

[5] *The pertinent part of §152 states: "The amount payable under any building or remodeling contract shall, upon receipt by any contractor or subcontractor, be held as trust funds for the payment of all lienable claims due and owing or to become due and owing...by reason of such building or remodeling contract." §153 states: "The trust funds created under Section 152 of this title shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims...have been paid." Section 153 also states that managing officers of corporations shall be liable for the proper application of such trust funds.*

A defalcation exists where "even the merest deficit" is caused by the debtor's misconduct, even if the conduct does not benefit him. *In Re Crosswhite,* 91 B.R. 156, 160 (bankr. M.D. Fla. 1988).[6] Appellants engaged in misconduct by not paying some of the subcontractors. Furthermore, by reason of the statutory trust established by operation of §§152 and §153, Appellants were acting in a fiduciary capacity. *In Re Geer, 137 B.R. 37,40 (Bankr. W.D. Mo. 1991).* Consequently, the issues in the state court judgment are the same as the ones underlying a determination of dischargeability under 11 U.S.C. § 523(a)(4).[7] In addition, the other two elements of collateral estoppel are met. Therefore, the doctrine of collateral estoppel applies.

B. Should Punitive Damages Awarded Under the Oklahoma Construction Trust Statutes Be Discharged under 11 U.S.C. § 523(a)(4)?

As discussed above, the actual damages and attorney fees awarded in the state court judgment should not be discharged pursuant to §523(a)(4).[8] However, Appellants maintain that §523(a)(4) does not support the Bankruptcy Court's finding that punitive damages are nondischargeable.

Two questions surface on this issue. First, as a general rule, should punitive damages be nondischargeable? Second, given the facts of this case, did the Bankruptcy Court err in refusing to discharge the punitive damage award from the state court

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[6] *Defalcation does not require the level of wrongdoing necessary for fraud or embezzlement. In Re Boudakian, 137 B.R. 89, 94 (Bankr. R.I. 1992).*

[7] *This Court also affirms the Bankruptcy Court's decision regarding Appellants' third issue. Wrote the Bankruptcy Court: "The Court concludes that mere failure to give notice of the possibility of liens...does not cancel a contractor's fiduciary duty to hold trust funds pursuant to...§§152,153." The Bankruptcy Court also properly wrote: "Whether the liens ultimately proved enforceable or not is beside the point: trust funds were still received, they were still misapplied, and such misapplication still caused damage to the Bryans."*

[8] *Appellants argue that dischargeability of punitive damages should be governed by 11 U.S.C. §523(a)(6) as opposed to 11 U.S.C. §523(a)(4). This Court disagrees.*

judgment?

Courts are divided in respect to the first question. However, this Court relies, in part, on a Tenth Circuit case that did not disturb a bankruptcy court's decision that punitive damages were nondischargeable.

In Re Wallace[9] arose after a New Mexico state court awarded both compensatory and punitive damages against the debtor on fraud and conversion claims. The Bankruptcy Court found the New Mexico judgment nondischargeable under §523(a)(4) and (6), and the Tenth Circuit affirmed.[10]

In Re Dahlstrom[11] also discusses nondischargeability as regards punitive damages. The Court concluded that a majority of courts addressing the issue have held such damages to be nondischargeable either as a general rule or depending on the circumstances of a specific case. While the case centered on an interpretation of 11 U.S.C. §523(a)(6), it is nevertheless persuasive. Therefore, as a general rule, punitive damages can be held to be nondischargeable.

The second question is whether, under the circumstances of this case, the Bankruptcy Court erred in finding the punitive damages award to be nondischargeable. Again, courts are divided on the issue; however, the analysis in *In Re Scheuer*, 125 B.R. 584 (Bkrtcy.C.D.Cal. 1991) is helpful. *In Re Scheuer* dealt with whether punitive damages should be discharged under §523(a)(4). Wrote the court:

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[9] *840 F.2d 762 (10th Cir. 1988).*

[10] *While the issue of whether punitive damages were dischargeable was not discussed, this Court finds it significant that the Tenth Circuit allowed the ruling to stand.*

[11] *129 B.R. 240 (Bankr. D.Utah 1991).*

> **The bankruptcy court is a court of equity. The bankruptcy judge, therefore, should have the power to review all the facts and circumstances relating to the judgment and decide whether the penalty element should be nondischargeable along with the compensatory element. Some factors the judge might consider included (1) the extent to which the acts causing the liability were willful and malicious, (2) the debtor's culpability, (3) the extent to which the compensatory element adequately redresses the wrong done to the claimant, (4) the legal and factual justification for the penalty and (5) the impact on the penalty on debtor's ability to achieve a fresh start.**

In this case, the first factor to be considered is whether the actions complained of were found to be willful and malicious. Appellants argue that no such finding was made by the state court. However, a statement from the trial court is persuasive in answering this question:

> **It is obvious to the Court that your clients, the two principals [Appellants], totally disregarded the statute...They commingled the funds. They left large amounts of claims that were...not paid, putting the entire obligation of those on the homeowner...The Court feels in situations like this, malice and ill-will and disregard, certainly can be presumed if one just disregards the statute as both of your clients have done in this case.** *Volume II of Trial Transcript, page 400, lines 12-21.*[12]

Second, Appellants were culpable. The facts show that Appellees paid them $106,500 on the remodeling contract. Of that, Watkins paid $64,869.43 to subcontractors, leaving $41,630.57. Instead of taking that money and paying the remaining subcontractor bills, Appellants used it for other purposes.

Third, the record is hazy concerning whether the actual damages awarded to Appellees adequately redressed the wrong done, although specific facts are not offered on that point.

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[12] *The trial transcript was not originally designated as a part of the Appellate record. However, both parties agreed to designate it as part of the record prior to the opinion.*

The fourth factor, however, is decisive in favor of Appellees. The state court first found that Appellants violated 42 O.S. §§152 and 153. Then, by imposing punitive damages, the court found the conduct to either be gross negligence or **"evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed."**[13] Furthermore, by assessing punitive damages, the state court punished Appellants and/or sent a warning to other construction companies regarding violation of §§152 and 153. This takes on greater significance because such a penalty is supported by strong public policy.[14] Consequently, a strong legal and factual justification for the penalty existed.

Little examination of the fifth factor is needed. The record suggests that Appellants should not be aided by the "fresh start" philosophy of the Bankruptcy Act.[15] Therefore, after examining the five factors, the Court finds the Bankruptcy Court did not err on this issue.

III. Conclusion

The state court found that Appellants violated 42 O.S. §§152 and 153 by violating their fiduciary duty to a construction trust. The state court also found Appellants' conduct to merit punitive damages. Those findings invoke the doctrine of collateral estoppel, and,

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[13] *Gross negligence is taken from the jury instructions. The rest of the language appears both in the jury instructions and in 23 O.S. §9(A).*

[14] *There is a strong public policy argument behind §§ 152 and 153. The statutes are used as a trust device to prevent the use of construction-generated funds for any other purpose other than payment of valid lienable claims. These sections "safeguard the rights of lien claimants on the job" and "protect an owner, contractor, subcontractor or other beneficiary from exposure in excess of the contract limit." Sandpiper North Apartments v. American National Bank, 680 P.2d 983, 987 (Okla. 1984).*

[15] *It should be noted that the Supreme Court has stated that the Bankruptcy Act "limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor". Grogan v. Garner, 111 S.Ct. 654, 659 (1991)(emphasis added). Based on the record, Appellants do not fit into this category.*

as a result, the Bankruptcy Court did not err in finding that actual damages and attorney fees were nondischargeable under 11 U.S.C. §523(a)(4).

Furthermore, the Bankruptcy Court did not err in finding the award of punitive damages by the state court to be nondischargeable under 11 U.S.C. §523(a)(4). Accordingly, given the facts of this case, and the findings of the state court, punitive damages should not be discharged. Therefore, the Bankruptcy Court's decision is **AFFIRMED.**

SO ORDERED THIS 26th day of May, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN BRYAN, et al,

Plaintiffs,

v.

JIM DONN MANLEY, et al,

Defendants.

~~92-C-0029-B~~ 92-C-0137-B

ORDER

In 1990, a state court jury awarded John and Deborah Bryan ("Appellees") $36,620.36 in actual damages, $76,630.57 in punitive damages and $54,148.50 in attorney fees against Jim Donn Manley and John L. Houchin ("Appellants"). Appellants then filed for bankruptcy protection, arguing that the state court judgment be discharged.

The Bankruptcy Court ruled against Appellants, finding the judgment to be nondischargeable. Appellants now appeal, asserting three issues: (1) Whether collateral estoppel was properly applied; (2) Whether the Bankruptcy Court erred in finding that punitive damages awarded under the Oklahoma Construction Trust Statutes are nondischargeable under 11 U.S.C. § 523(a)(4); and (3) Whether the Bankruptcy Court erred in finding Appellants' action constituted defalcation while acting in a fiduciary capacity.

For the reasons listed below, the Bankruptcy Court's decision is affirmed.

I. Summary of Facts/Procedural History

In September 1985, Appellees contracted with Watkins Construction Company

("Watkins") to remodel their Tulsa home.[1] The contract called for Appellees to pay Watkins $119,325.00. Based on the work Watkins completed, Appellees paid Watkins $106,500. Of that, Watkins paid $64,869.43 to subcontractors who worked on or provided supplies for the remodeling. The remaining $41,630.57 was kept by Watkins, although the company still owed money to unpaid subcontractors.

Appellees then chose to directly pay some of those subcontractors who had not yet been paid. Some of these subcontractors had filed lien statements and some had not. The subcontractor with the largest claim filed an action to foreclose his lien statement in Tulsa County District Court against the Appellees. Appellees successfully defended on the basis that the lien was unenforceable.

Subsequently, on November 13, 1986, Appellees filed suit in the Tulsa County District Court (the "State Court") against Watkins, seeking actual and punitive damages for what they believed to be a violation of the Oklahoma Construction Trust Statutes. A jury later awarded Appellees $36,620.36 in actual damages, $76,630.57 in punitive damages and $54,148.50 for attorney fees.

After the state court judgment, Appellants filed a voluntary Petition for Bankruptcy. Once the bankruptcy Petition was filed, Appellees sought to prevent Appellants from discharging the judgment. Summary judgment motions were filed by both parties on the dischargeability issue.

On January 3, 1992, the Bankruptcy Court denied Manleys' Motion for Summary Judgment. On February 6, 1993, the Bankruptcy Court granted Appellees' Motion For

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Summary Judgment. The net effect of the ruling was that the state court judgment could not be discharged.[2] Appellants now appeal the Bankruptcy Court's decision.

II. Legal Analysis

Appellants assert the following errors by the Bankruptcy Court: (1) The court erred in its application of collateral estoppel; (2) The court erred in finding that punitive damages awarded under the Oklahoma Construction Trust Statutes can be nondischargeable under 11 U.S.C. § 523(a)(4); and (3) The court erred in finding Appellants' action constituted defalcation while acting in a fiduciary capacity. Each issue will be discussed below.

A. The Collateral Estoppel Issue

The Bankruptcy Court found that the Appellees' judgment against Appellants was not dischargeable under 11 U.S.C. §523(a)(4).[3] The Bankruptcy Court applied the doctrine of collateral estoppel, concluding that the state court found evidence of misconduct. This finding, reasoned the Bankruptcy Court, prevented it from re-litigating the factual issue of whether Appellants' committed "fraud or defalcation while acting in a fiduciary capacity." The Bankruptcy Court determined that the requirements for §523(a)(4) were met, and the judgment was not dischargeable.[4]

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The central question in this appeal focuses on whether the issue is the same one decided in the state court judgment. The issue arises under §523(a)(4): Did Appellants commit "defalcation while acting in a fiduciary capacity?"

The state court jury found that Appellants violated 42 O.S. §§152 and 153.[5] Those statutes create a trust for funds paid to Appellants for the remodeling contract. The jury found that Appellants violated the statutes because the payments received by Watkins were diverted to "a purpose other than payment of valid lienable claims." In other words, Watkins did not pay all of its subcontractors; instead, Appellants took part of Appellees' money and used it for something else.

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B. Should Punitive Damages Awarded Under the Oklahoma Construction Trust Statutes Be Discharged under 11 U.S.C. § 523(a)(4)?

As discussed above, the actual damages and attorney fees awarded in the state court judgment should not be discharged pursuant to §523(a)(4).[8] However, Appellants maintain that §523(a)(4) does not support the Bankruptcy Court's finding that punitive damages are nondischargeable.

Two questions surface on this issue. First, as a general rule, should punitive damages be nondischargeable? Second, given the facts of this case, did the Bankruptcy Court err in refusing to discharge the punitive damage award from the state court

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In this case, the first factor to be considered is whether the actions complained of were found to be willful and malicious. Appellants argue that no such finding was made by the state court. However, a statement from the trial court is persuasive in answering this question:

> **It is obvious to the Court that your clients, the two principals [Appellants], totally disregarded the statute...They commingled the funds. They left large amounts of claims that were...not paid, putting the entire obligation of those on the homeowner...The Court feels in situations like this, malice and ill-will and disregard, certainly can be presumed if one just disregards the statute as both of your clients have done in this case.** *Volume II of Trial Transcript, page 400, lines 12-21.*[12]

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Little examination of the fifth factor is needed. The record suggests that Appellants should not be aided by the "fresh start" philosophy of the Bankruptcy Act.[15] Therefore, after examining the five factors, the Court finds the Bankruptcy Court did not err on this issue.

III. Conclusion

The state court found that Appellants violated 42 O.S. §§152 and 153 by violating their fiduciary duty to a construction trust. The state court also found Appellants' conduct to merit punitive damages. Those findings invoke the doctrine of collateral estoppel, and,

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Furthermore, the Bankruptcy Court did not err in finding the award of punitive damages by the state court to be nondischargeable under 11 U.S.C. §523(a)(4). Accordingly, given the facts of this case, and the findings of the state court, punitive damages should not be discharged. Therefore, the Bankruptcy Court's decision is **AFFIRMED.**

SO ORDERED THIS 26th day of May, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

5/27/93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 26 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

NANCY OWENS,

Plaintiff,

vs.

MERCK & CO., INC.,

Defendant.

CASE NO. 93-C-450B

DISMISSAL WITHOUT PREJUDICE

Comes now the Plaintiff, Nancy Owens, and pursuant to the provisions of Rule 41 (a), F.R.C.P., Defendant not having filed an answer, counter claim or other pleadings herein, hereby dismisses the above styled action WITHOUT PREJUDICE.

LOEFFLER, ALLEN & HAM

By _____

Sam T. Allen, III
P. O. Box 230
Sapulpa, Oklahoma 74067
PHONE: (918) 224-5302
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I certify that on the 25th day of May, 1993, I mailed a true and correct copy of the above and foregoing Dismissal, with postage fully paid thereon, to: (1) Mr. David Strecker, SHIPLEY, INHOFE & STRECKER, 3600 First National Tower, 15 East Fifth Street, Tulsa, Ok 74103-4307, and (2) Joel H. Kaplan, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Suite 4200, 55 East Monroe Street, Chicago, IL 60603, attorneys for Defendant.

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Sam T. Allen, III

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN BRYAN, et al,

Plaintiffs,

v.

JIM DONN MANLEY, et al,

Defendants.

~~92-C-0029-B~~
92-C-138-B

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In 1990, a state court jury awarded John and Deborah Bryan ("Appellees") $36,620.36 in actual damages, $76,630.57 in punitive damages and $54,148.50 in attorney fees against Jim Donn Manley and John L. Houchin ("Appellants"). Appellants then filed for bankruptcy protection, arguing that the state court judgment be discharged.

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For the reasons listed below, the Bankruptcy Court's decision is **affirmed.**

I. Summary of Facts/Procedural History

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("Watkins") to remodel their Tulsa home.[1] The contract called for Appellees to pay Watkins $119,325.00. Based on the work Watkins completed, Appellees paid Watkins $106,500. Of that, Watkins paid $64,869.43 to subcontractors who worked on or provided supplies for the remodeling. The remaining $41,630.57 was kept by Watkins, although the company still owed money to unpaid subcontractors.

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Summary Judgment. The net effect of the ruling was that the state court judgment could not be discharged.[2] Appellants now appeal the Bankruptcy Court's decision.

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Appellants assert the following errors by the Bankruptcy Court: (1) The court erred in its application of collateral estoppel; (2) The court erred in finding that punitive damages awarded under the Oklahoma Construction Trust Statutes can be nondischargeable under 11 U.S.C. § 523(a)(4); and (3) The court erred in finding Appellants' action constituted defalcation while acting in a fiduciary capacity. Each issue will be discussed below.

A. The Collateral Estoppel Issue

The Bankruptcy Court found that the Appellees' judgment against Appellants was not dischargeable under 11 U.S.C. §523(a)(4).[3] The Bankruptcy Court applied the doctrine of collateral estoppel, concluding that the state court found evidence of misconduct. This finding, reasoned the Bankruptcy Court, prevented it from re-litigating the factual issue of whether Appellants' committed "fraud or defalcation while acting in a fiduciary capacity." The Bankruptcy Court determined that the requirements for §523(a)(4) were met, and the judgment was not dischargeable.[4]

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[2] *Appellants appealed the decision of the state court. However, on November 10, 1992 the Oklahoma Supreme Court denied certiorari. See, Defendants' Notice (docket #16).*

[3] *11 U.S.C. §523(a)(4) reads: A discharge under section 727 does not discharge an individual debtor from any debt...for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny(emphasis added).*

[4] *The Bankruptcy Court relied, in part on 23 O.S. §9(A), which reads: "In any action for the breach of an obligation not arising from contract...[where] there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may [award punitive damages larger than the actual damage award.] Applying that statute, the Bankruptcy Court wrote: "The state court judgment...did award punitive damages..."exceeding the amount of actual damages [quoting 23 O.S. §9(A)]." If this award was made pursuant to...23 O.S. §9(A), then the State court judge must have determined that [there was evidence] of misconduct.(emphasis added). It should be noted that it is unclear from the record whether 23 O.S. §9(A) was*

The first issue is whether the Bankruptcy Court properly applied the doctrine of collateral estoppel. The Bankruptcy Court is collaterally estopped if (1) the issue to be precluded is the same as that involved in the prior state action; (2) the issue was actually litigated by the parties; and (3) the state court's determination of the issue was necessary to the resulting final and valid judgment. *In Re Wallace*, 840 F.2d 762, 765 (10th Cir. 1988).

The central question in this appeal focuses on whether the issue is the same one decided in the state court judgment. The issue arises under §523(a)(4): Did Appellants commit "defalcation while acting in a fiduciary capacity?"

The state court jury found that Appellants violated 42 O.S. §§152 and 153.[5] Those statutes create a trust for funds paid to Appellants for the remodeling contract. The jury found that Appellants violated the statutes because the payments received by Watkins were diverted to "a purpose other than payment of valid lienable claims." In other words, Watkins did not pay all of its subcontractors; instead, Appellants took part of Appellees' money and used it for something else.

Therefore, the issue boils down to whether the facts underlying the violation of §§152 and 153 deal with the same issue as determining whether Appellants committed "defalcation while acting in a fiduciary capacity?".

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that [there was evidence] of misconduct (emphasis added). It should be noted that it is unclear from the record whether 23 O.S. §9(A) was the basis for the jury instructions.

[5] *The pertinent part of §152 states: "The amount payable under any building or remodeling contract shall, upon receipt by any contractor or subcontractor, be held as trust funds for the payment of all lienable claims due and owing or to become due and owing...by reason of such building or remodeling contract." §153 states: "The trust funds created under Section 152 of this title shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims...have been paid." Section 153 also states that managing officers of corporations shall be liable for the proper application of such trust funds.*

A defalcation exists where "even the merest deficit" is caused by the debtor's misconduct, even if the conduct does not benefit him. *In Re Crosswhite,* 91 B.R. 156, 160 (bankr. M.D. Fla. 1988).[6] Appellants engaged in misconduct by not paying some of the subcontractors. Furthermore, by reason of the statutory trust established by operation of §§152 and §153, Appellants were acting in a fiduciary capacity. *In Re Geer, 137 B.R. 37,40 (Bankr. W.D. Mo. 1991).* Consequently, the issues in the state court judgment are the same as the ones underlying a determination of dischargeability under 11 U.S.C. § 523(a)(4).[7] In addition, the other two elements of collateral estoppel are met. Therefore, the doctrine of collateral estoppel applies.

B. Should Punitive Damages Awarded Under the Oklahoma Construction Trust Statutes Be Discharged under 11 U.S.C. § 523(a)(4)?

As discussed above, the actual damages and attorney fees awarded in the state court judgment should not be discharged pursuant to §523(a)(4).[8] However, Appellants maintain that §523(a)(4) does not support the Bankruptcy Court's finding that punitive damages are nondischargeable.

Two questions surface on this issue. First, as a general rule, should punitive damages be nondischargeable? Second, given the facts of this case, did the Bankruptcy Court err in refusing to discharge the punitive damage award from the state court

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[6] *Defalcation does not require the level of wrongdoing necessary for fraud or embezzlement. In Re Boudakian, 137 B.R. 89, 94 (Bankr. R.I. 1992).*

[7] *This Court also affirms the Bankruptcy Court's decision regarding Appellants' third issue. Wrote the Bankruptcy Court: "The Court concludes that mere failure to give notice of the possibility of liens...does not cancel a contractor's fiduciary duty to hold trust funds pursuant to...§§152,153." The Bankruptcy Court also properly wrote: "Whether the liens ultimately proved enforceable or not is beside the point: trust funds were still received, they were still misapplied, and such misapplication still caused damage to the Bryans."*

[8] *Appellants argue that dischargeability of punitive damages should be governed by 11 U.S.C. §523(a)(6) as opposed to 11 U.S.C. §523(a)(4). This Court disagrees.*

judgment?

Courts are divided in respect to the first question. However, this Court relies, in part, on a Tenth Circuit case that did not disturb a bankruptcy court's decision that punitive damages were nondischargeable.

In Re Wallace[9] arose after a New Mexico state court awarded both compensatory and punitive damages against the debtor on fraud and conversion claims. The Bankruptcy Court found the New Mexico judgment nondischargeable under §523(a)(4) and (6), and the Tenth Circuit affirmed.[10]

In Re Dahlstrom[11] also discusses nondischargeability as regards punitive damages. The Court concluded that a majority of courts addressing the issue have held such damages to be nondischargeable either as a general rule or depending on the circumstances of a specific case. While the case centered on an interpretation of 11 U.S.C. §523(a)(6), it is nevertheless persuasive. Therefore, as a general rule, punitive damages can be held to be nondischargeable.

The second question is whether, under the circumstances of this case, the Bankruptcy Court erred in finding the punitive damages award to be nondischargeable. Again, courts are divided on the issue; however, the analysis in *In Re Scheuer*, 125 B.R. 584 (Bkrtcy.C.D.Cal. 1991) is helpful. *In Re Scheuer* dealt with whether punitive damages should be discharged under §523(a)(4). Wrote the court:

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[9] *840 F.2d 762 (10th Cir. 1988).*

[10] *While the issue of whether punitive damages were dischargeable was not discussed, this Court finds it significant that the Tenth Circuit allowed the ruling to stand.*

[11] *129 B.R. 240 (Bankr. D.Utah 1991).*

> **The bankruptcy court is a court of equity. The bankruptcy judge, therefore, should have the power to review all the facts and circumstances relating to the judgment and decide whether the penalty element should be nondischargeable along with the compensatory element. Some factors the judge might consider included (1) the extent to which the acts causing the liability were willful and malicious, (2) the debtor's culpability, (3) the extent to which the compensatory element adequately redresses the wrong done to the claimant, (4) the legal and factual justification for the penalty and (5) the impact on the penalty on debtor's ability to achieve a fresh start.**

In this case, the first factor to be considered is whether the actions complained of were found to be willful and malicious. Appellants argue that no such finding was made by the state court. However, a statement from the trial court is persuasive in answering this question:

> **It is obvious to the Court that your clients, the two principals [Appellants], totally disregarded the statute...They commingled the funds. They left large amounts of claims that were...not paid, putting the entire obligation of those on the homeowner...The Court feels in situations like this, malice and ill-will and disregard, certainly can be presumed if one just disregards the statute as both of your clients have done in this case.** *Volume II of Trial Transcript, page 400, lines 12-21.*[12]

Second, Appellants were culpable. The facts show that Appellees paid them $106,500 on the remodeling contract. Of that, Watkins paid $64,869.43 to subcontractors, leaving $41,630.57. Instead of taking that money and paying the remaining subcontractor bills, Appellants used it for other purposes.

Third, the record is hazy concerning whether the actual damages awarded to Appellees adequately redressed the wrong done, although specific facts are not offered on that point.

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[12] *The trial transcript was not originally designated as a part of the Appellate record. However, both parties agreed to designate it as part of the record prior to the opinion.*

The fourth factor, however, is decisive in favor of Appellees. The state court first found that Appellants violated 42 O.S. §§152 and 153. Then, by imposing punitive damages, the court found the conduct to either be gross negligence or **"evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed."**[13] Furthermore, by assessing punitive damages, the state court punished Appellants and/or sent a warning to other construction companies regarding violation of §§152 and 153. This takes on greater significance because such a penalty is supported by strong public policy.[14] Consequently, a strong legal and factual justification for the penalty existed.

Little examination of the fifth factor is needed. The record suggests that Appellants should not be aided by the "fresh start" philosophy of the Bankruptcy Act.[15] Therefore, after examining the five factors, the Court finds the Bankruptcy Court did not err on this issue.

III. Conclusion

The state court found that Appellants violated 42 O.S. §§152 and 153 by violating their fiduciary duty to a construction trust. The state court also found Appellants' conduct to merit punitive damages. Those findings invoke the doctrine of collateral estoppel, and,

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[13] *Gross negligence is taken from the jury instructions. The rest of the language appears both in the jury instructions and in 23 O.S. §9(A).*

[14] *There is a strong public policy argument behind §§ 152 and 153. The statutes are used as a trust device to prevent the use of construction-generated funds for any other purpose other than payment of valid lienable claims. These sections "safeguard the rights of lien claimants on the job" and "protect an owner, contractor, subcontractor or other beneficiary from exposure in excess of the contract limit." Sandpiper North Apartments v. American National Bank, 680 P.2d 983, 987 (Okla. 1984).*

[15] *It should be noted that the Supreme Court has stated that the Bankruptcy Act "limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor". Grogan v. Garner, 111 S.Ct. 654, 659 (1991)(emphasis added). Based on the record, Appellants do not fit into this category.*

as a result, the Bankruptcy Court did not err in finding that actual damages and attorney fees were nondischargeable under 11 U.S.C. §523(a)(4).

Furthermore, the Bankruptcy Court did not err in finding the award of punitive damages by the state court to be nondischargeable under 11 U.S.C. §523(a)(4). Accordingly, given the facts of this case, and the findings of the state court, punitive damages should not be discharged. Therefore, the Bankruptcy Court's decision is **AFFIRMED.**

SO ORDERED THIS 26th day of May, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SWEDE INDUSTRIES, INC.,

Plaintiff,

vs.

ZEBCO CORPORATION, a Delaware Corporation, and the BRUNSWICK CORPORATION, a Delaware Corporation,

Defendants.

Case No. 90-C-596-B

O R D E R

This matter comes on for consideration of Defendants', Zebco Corporation and Brunswick Corporation (hereinafter Zebco), Motions for Summary Judgment as follows:

(1) Defendants' Motion For Summary Judgment Of Invalidity Of U.S. Patent No. 4,961,547 Under 35 U.S.C. §102(b) (#161); and

(2) Defendants' Motion For Summary Judgment Of Non-Infringement Of Design Patent (#164); and

(3) Defendants' Motion For Summary Judgment Of Invalidity Of U.S. Patent No. 4,961,547 Under 35 U.S.C. § 112 (#166).

Also for consideration is Plaintiff's Counter Motion For Summary Judgment Of Validity And Infringement (#189).

For the reasons stated herein the Court concludes Motions #161 and #166 should be denied and Motion #164 should be granted. Further, the Court concludes Plaintiff's Counter Motion (#189)

should be denied. The Court will initially discuss the Motion granted.

Plaintiff, Swede Industries, Inc., (Swede), in its Complaint, has charged Defendants, Zebco Corporation and the Brunswick Corporation, with infringement of both a design (ornamental) patent and a utility (mechanical) patent.

Zebco's statement of material facts, intermingled with argument, provides in essence: Swede charges that Zebco's BULLET Model Nos. .38, .357, .257 and .22 fishing reels infringe Swede Design Patent No. 307,621 (hereinafter 621); that Zebco filed a U.S. Patent Application Serial No. 07/459,595 on January 2, 1990 on these BULLET models; that in order for Zebco's BULLET models to be covered by Swede's 621 design patent (applied for in 1987 but not granted until May 1, 1990) the Swede design must encompass the design disclosed in Zebco's 1990 patent application; that Zebco's design application for its BULLET reels was determined by the United States Patent and Trademark Office (PTO) to be unpatentable under 35 U.S.C. § 103 as obvious to a person of ordinary skill in the art over the combination of Hammer Design Patent No. 184,618 and Johnson Patent No. 2,932,465.

Based upon the foregoing facts Zebco argues that if its application for a design patent was turned down by PTO because of the prior art of the Hammer Design Patent, issued in 1959, and Johnson Patent, issued in 1960 (i.e. a combination of the *back* of the Hammer spinning reel and the *front* of the Johnson spinning reel) then the Hammer and Johnson patents must also be prior art to the

Swede design which would then also be unpatentable (invalid) and therefore incapable of being infringed. The Court agrees.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **Celotex Corp. v. Catrett**, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); **Wingon Third Oil and Gas v. Federal Deposit Insurance Corporation**, 805 F.2d 342 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In **Celotex**, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." **Matsushita v. Zenith**, 475 U.S. 574, 585, 106 S.Ct. 1348, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. **Anderson v. Liberty Lobby, Inc.**, *supra*, wherein the Court stated that:

> ". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by **Celotex** and **Anderson**. **Setliff v. Memorial Hospital of Sheridan County**, 850 F.2d 1384 (10th Cir. 1988).

Summary judgment is an appropriate vehicle where, as here, there is no dispute as to the design aspect of the Swede, Zebco, Hammer and Johnson reels. **Winner Intern Corp. v. Wolo Mfg. Corp.** 905 F.2d 375 (Fed Cir.1990). See, also 10A Wright, Miller & Kane, **Federal Practice & Procedure, ¶2732.1 at 323 (3rd Ed.1983).**

It is an accepted principle that decisions of Federal agencies should be given deference, **Chevron, U.S.A. v. Natural Res. Def. Council**, 467 U.S. 837 (1984), particularly where uncommon expertise and training impact such decisions, such as the patent field. **American Hoist & Derrick Co. v. Sowa & Sons, Inc.**, 725 F.2d 1350 (Fed.Cir.) **cert.denied** 469 U.S. 821 (1984). If the claim of a patent is read to cover a device or design for infringement purposes, then that claim would be invalid if that same device or design is in the prior art. **Polaroid Corp. v. Eastman Kodak Co.**, 789 F.2d 1556 (Fed.Cir.1986) **cert.denied** 479 U.S. 850 (1986); **Peters v. Active Mfg. Co.**, 129 U.S. 530 (1889). In **Polaroid** the Court stated, at 1573:

> ". . .[The infringer] asserts that its accused cameras are identical to the structure disclosed in [the prior art]. If that were true, there would be error, for 'that which infringes if later anticipates if earlier.'"

(citing **Peters v. Active Mfg. Co.**, at 537)

If a particular design is denied a design patent because it is obvious in view of the prior art, but another, highly similar design patent, is inexplicably granted a design patent despite the same prior art, the court concludes, as a matter of law, the granted design patentee cannot successfully charge design infringement against the denied design patentee. **Wilson Sporting Goods Co. v. David Geoffrey & Assoc.**, 904 F.2d 677 (Fed.Cir.1990). See, also **Insta-Foam Products Inc. v. Universal Foam Systems Inc.**, 906 F.2d 698 (Fed.Cir.1990). See also, **John O. Butler Company v. Block Drug Company, Inc.**, 620 F.Supp. 771 (N.D.Ill.1985); **J.G. Furniture Company, Inc. v. Litton Business Systems, Inc.**, 436 F.Supp. 380 (S.D.N.Y.1977); **W.A. Baum Co., Inc. v. Propper Manufacturing Co.**, 343 F.Supp. 1016 (E.D.N.Y.1972).

Nor is the Court convinced that Zebco admitted infringement in its statement of undisputed facts. Swede contends it is entitled to, and counter-moves for, summary judgment based upon Zebco's alleged admission of infringement. Zebco, it seems to the Court, admits similarity of design, not infringement of design. Even to the Court, an acknowledged non-engineer, all these reels bear considerable similarity to one another in design configuration.

The Court, in its own analysis of the various drafted designs, and the actual models of the reels,[1] concludes the Swede reel bears a greater similarity to the combination Johnson-front and Hammer-

[1] These five reels will be identified hereinafter as Court's Exhibits 1 through 5.

back than does the Zebco BULLET series (Court's Exhibits 2 through 5). When, in the record, the various drawings of each contending reel (Swede's and Zebco's) are superimposed upon one another from both the side and top view, you have a reel very close to the Johnson-front and Hammer-back combination.

Based on the foregoing the Court concludes Zebco's Motion For Summary Judgment (#164) based on the design issue should be and the same is hereby GRANTED.

The Court next examines Defendants' motion for summary judgment of invalidity of patent No. 4,961,547 (hereinafter 547) under 35 U.S.C. §112. Defendants have moved for summary judgment of invalidity of claims 1, 4-7, 11 and 12 of patent No. 547. That section sets forth requirements for the form of patents, including the claims thereof. Defendants argue that Plaintiff has failed to comply with ¶6 of §112 which permits claim elements to be expressed as a "means" so long as a function is expressed for the "means". Defendants argue that failure to include a function with a means element in a claim renders that claim invalid, citing **Ex parte Klumb**, 159 USPQ 694 (Pat.Off.Bd.App.1968), and that Swede has so failed in regards to claims 1, 4-7, 11 and 12. Specifically, Defendants aver that every claim that Swede alleges to be infringed includes both "a spool means" and "a cone means" without any function expressed in the claim for either the "spool means" or "cone means", in violation of §112.

In response, Swede argues the claims of the 547 patent use proper means-+-function language in reference to "cone means" and

"spool means", thereby fully satisfying the requirements of §112; that, for example, the use of the adjective "spool" modifying "means" exhibits the required clarity. Swede further argues the element "cone means" also has clarity by the use of the adjective "cone" to modify "means".

The Court concludes it would be of benefit to hear the testimony of the parties' experts *viz-a-viz* the means-+-function format. Also of benefit would be interpretive illumination of the spacing between the outer housing and the "cone means". The Court concludes that sufficient factual disputes appear in the pleadings and evidential offerings of the parties to warrant the denial of summary judgment on the §112 issue.

The Court next considers Defendants' motion for summary judgment of invalidity of the 547 patent under 35 U.S.C. §102(b). Defendants argue that claims 1, 4-7,11 and 12 read directly on prior art "can reels" made by Zebco and placed in public use and offered for sale by Zebco in the late 1970's.

§102(b) provides that an applicant shall be entitled to a patent unless the invention was in public use or on sale in this country more than one year prior to the date of the application for patent which, in the instant case, was June 12, 1988. Zebco further argues that its "490A can reel"[2] was developed and customized for sale to several companies, including Coca-Cola; that models were

[2] "can reels" were a novelty item wherein the mechanical workings of a closed face fishing reel were housed in the can of a commercial drink such as Coors beer or Coca-Cola. The items were promotion oriented.

given to certain individuals at Coca-Cola to spur interest in and possibly consummate a sale thereof which, Zebco argues, means the can reel was in public use and offered for sale many years before Swede made its 547 application.

In SWEDE'S response it argues there are material facts which preclude summary judgment on this issue such as:

The "can reel" or "beer can reel" was a Brunswick/Zebco experimental gimmick prototype and not a commercial model and could not thus be on sale; that no final production model was ever made nor sold; that the "can reel" project lay abandoned for over 14 years until March, 1992; that Zebco did not consider the "can reel" project prior art when it filed, in 1990, its own patent application for the Bullet reels; that the "can reels" were never used in an actual fishing environment and the project was dropped because of higher priority projects; that there was no commercial activity, orders, money made, sales made, profits made from the "can reels" which was part of a terminated development project that never bore fruit; and finally, that Zebco never filed for a patent on the "can reel" in 1978 when it alleges it came into use.

The Court concludes that are numerous factual conflicts regarding the "can reel" issue, thereby precluding summary judgment.

SUMMARY

Based upon the foregoing the Court concludes Motions #161 and #166 are not ripe for summary judgment and such Motions For Summary Judgment are DENIED. The Court further concludes that Summary

Judgment as to the design issue (#164) should be and the same is hereby GRANTED in favor of Defendants and against Plaintiff.

The parties are directed to adhere to the following schedule. Non-jury trial of this matter is set for June 21, 1993, at 9:00 a.m.. Parties are directed to file suggested Findings of Fact and Conclusions of Law, and any supplement to the Pre-Trial Order (with stipulations) by June 14, 1993.

IT IS SO ORDERED this 25th day of May, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

5/26/93

9361872P.DE2

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA Plaintiff, v. RICHARD L. PIERCE Defendant.	)	Case No. 93-C-0024-B

DEFAULT JUDGMENT

The Clerk having entered on May 4, 1993, the default of the defendant Richard L. Pierce and the plaintiff having requested a default judgment and submitted a declaration in support of the request for default judgment, it is hereby

ORDERED that, pursuant to Rule 55(b)(1) of the Federal Rules of Civil Procedure, default judgment is hereby entered against the defendant, Richard L. Pierce, for erroneous refunds for the tax years 1986 and 1987 in the amount of $7,872.00, plus statutory accruals, plus the costs of this action.

S/ THOMAS R. BRETT

~~CLERK OF THE~~ UNITED STATES DISTRICT ~~COURT~~ JUDGE

ENTERED ON DOCKET

DATE 5-26-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. GEORGE MARZETT, JR.; DIANTHA MARZETT a/k/a DIANTHA A. MARZETT; MID-CONTINENT CONSTRUCTION AND SUPPLY; PIONEER FINANCE OF OKLAHOMA, INC.; FORD CONSUMER CREDIT COMPANY; JOYCE A. MARZETT; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 89-C-455-E

FILED

MAY 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Upon the Motion of the United States of America acting on behalf of the Secretary of Veterans Affairs by F.L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, to which no objections have been filed, it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 26th day of May, 1993.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
F.L. DUNN, III
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3900 United States Courthouse
Tulsa, OK 74103
(918) 581-7463

KBA/esr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES SHEA,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 93-C-421-E

FILED

MAY 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER ENTERED 5/26/93.

Plaintiff's motion for leave to proceed in forma pauperis reveals that he has $1514.84 in his inmate savings account. Okla. Stat. tit. 57, § 563.2A(5) states that funds from an inmate's savings account may be used for fees or costs in filing a civil action. Plaintiff's motion for leave to proceed in forma pauperis is therefore **denied**. His complaint is accordingly **dismissed** at this time without prejudice for failure to pay the required filing fee. See Local Rule 6. The court will reinstate this action only if Plaintiff submits to the court the proper filing fee within thirty (30) days from this date.

SO ORDERED THIS 25th day of May, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 5-26-93

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SAMUEL BARNES; SHELA BARNES a/k/a SHELA Y. BARNES; TULSA DEVELOPMENT AUTHORITY; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	**CIVIL ACTION NO. 93-C-121-E**

FILED

MAY 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26 day of May, 1993. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendant, Tulsa Development Authority, appears by Doris L. Fransein; the Defendant, Board of County Commissioners, appears not, having previously disclaimed any right, title or interest in the subject property; the Defendant, County Treasurer, Tulsa County, Oklahoma, appears by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Samuel Barnes and Shela Barnes a/k/a Shela Y. Barnes, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Samuel Barnes, acknowledged receipt of Summons and Complaint on February 25, 1993; that the Defendant, Shela Barnes a/k/a Shela Y. Barnes, acknowledged receipt of Summons and Complaint on February 22, 1993; that the

Defendant, Tulsa Development Authority, acknowledged receipt of Summons and Complaint on February 16, 1993; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 17, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 17, 1993.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on March 9, 1993; that the Defendant, Tulsa Development Authority, filed its Answer and Cross-Claim on February 25, 1993; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on March 9, 1993, disclaiming any right, title or interest in the subject property; and that the Defendants, Samuel Barnes and Shela Barnes a/k/a Shela Y. Barnes, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Twenty-two (22), Block Three (3), MARION TERRACE ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on December 13, 1985, the Defendants, Samuel Barnes and Shela Barnes a/k/a Shela Y. Barnes,

executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $40,000.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Samuel Barnes and Shela Barnes a/k/a Shela Y. Barnes, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated December 13, 1985, covering the above-described property. Said mortgage was recorded on December 27, 1985, in Book 4915, Page 855, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Samuel Barnes and Shela Barnes a/k/a Shela Y. Barnes, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Samuel Barnes and Shela Barnes a/k/a Shela Y. Barnes, are indebted to the Plaintiff in the principal sum of $38,526.70, plus interest at the rate of 11.5 percent per annum from July 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal

property taxes in the amount of $2.00 which became a lien on the property. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Samuel Barnes and Shela Barnes a/k/a Shela Y. Barnes, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, Tulsa Development Authority, has a lien on the property which is the subject matter of this action by virtue of a note and Assignment of Mortgage, of which the mortgage is recorded in the records of Tulsa County, Oklahoma in Book 5123 at Page 2387; and that Defendant, Tulsa Development Authority, prays for judgment in personam against Defendants, Samuel Barnes and Shela Barnes, for the sum of $3,325.00, with accrued interest at the judgment rate from and after July 1, 1992, together with a reasonable attorney's fee in the sum of $450.00 and costs. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Samuel Barnes and Shela Barnes a/k/a Shela Y. Barnes, in the principal sum of $38,526.70, plus interest at the rate of 11.5 percent per annum from July 1, 1992 until judgment, plus interest thereafter at the current legal rate of 3.25 percent per annum

until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $2.00 for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Samuel Barnes, Shela Barnes a/k/a Shela Y. Barnes, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Tulsa Development Authority, have and recover judgment in personam against Defendants, Samuel Barnes and Shela Barnes, for the sum of $3,325.00, with accrued interest at the judgment rate from and after July 1, 1992, together with a reasonable attorney's fee in the sum of $450.00 and costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Samuel Barnes and Shela Barnes a/k/a Shela Y. Barnes, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, Tulsa Development Authority in personam against Defendants, Samuel Barnes and Shela Barnes, for the sum of $3,325.00, with accrued interest at the judgment rate from and after July 1, 1992, together with a reasonable attorney's fee in the sum of $450.00 and costs.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $2.00 for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

F.L. DUNN, III
United States Attorney

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Assistant District Attorney
Attorney for Defendant,
County Treasurer,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-121-E

WDB/esr

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THE F&M BANK & TRUST COMPANY,	)	
	)	
Appellant,	)	
	)	
v.	)	92-C-0978-C
	)	92-C-0979-C
DUANE HIGGINS,	)	92-C-0980-C
	)	
Appellee.	)	

ORDER

Now before this Court is an appeal of a Bankruptcy Court decision by F&M Bank Trust Company ("F&M"). On October 27, 1992, the Bankruptcy Court issued an Order of Abandonment, which allowed the Trustee to abandon his interest in a lender liability claim. F&M now argues that the Bankruptcy Court erred in issuing the Order.

The facts are as follows. Appellees, a construction business, filed a lender liability action against F&M in Tulsa County District Court for breach of contract, fraud and breach of a joint venture agreement. The state court granted F&M's summary judgment motion, and Appellees appealed to the Oklahoma Supreme Court ("Appeal").[1]

On May 14, 1992, Appellees filed for protection under Chapter 7 of the Bankruptcy Code, seeking relief from F&M's deficiency judgment. Appellees then filed a Motion for Order of Abandonment, attempting to have the Trustee abandon any interest in the pending Appeal. Appellees estimated the Appeal claim to be worth $50,000; however, F&M has offered to settle the claim for $5,000.

[1] *Based on the information this Court has, the appeal is still pending.*

On October 22, 1992, the Bankruptcy Court held a hearing. Following the hearing, the Bankruptcy Court approved the abandonment order. In part, its order reads:

> **The Court...finds that Debtor's Motion should be granted; that the Trustee should abandon any interest in the pending appeal...under 11 U.S.C. §554(b) because it is burdensome to the estate and is of inconsequential value and benefit to the estate.** *Appellees' Brief, Exhibit A.*

The issue before this Court is whether the Bankruptcy Court erred in issuing an Order of Abandonment.[2] The statute relied upon by the Bankruptcy Court in ordering the abandonment is 11 U.S.C. §554(b), which states:

> **On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.** (*emphasis added).*

An order compelling abandonment is the exception -- not the rule. *In Re K.C. Machine & Tool Co.*, 816 F.2d 238, 246 (6th Cir. 1987). In addition, abandonment should not be ordered **"where the benefit of administering the asset exceeds the cost of doing so."** *Id.*

In this case, F&M argues that the claim should not be abandoned. Writes F&M:

> **It is clear that if the Trustee administers the cause of action, the bankruptcy estate will be benefitted. The Trustee could immediately accept the pending settlement offer, and receive $5,000. This amount would certainly be in excess of the cost involved in accepting the offer. Therefore, upon administering the asset, the Trustee would create a fund to pay a portion of the bankruptcy estate's debts, and correspondingly, administering the asset would benefit the bankruptcy estate.** *Appellants' Brief, page 7.*

This Court does not find F&M's arguments persuasive. No cases on point were cited by the parties or otherwise presented to the court. However, the fact that F&M offered

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[2] *The parties do not dispute the facts. Therefore, the standard of review will be de novo.*

$5,000 for the Appeals claim does not mean the claim cannot be abandoned. All factors must be considered. This is especially true in light of the Trustee's testimony that the claim had no value to the estate.[3] In addition, the fact that F&M is the only creditor is significant. Furthermore, it seems more logical for the parties to resolve the issue outside of Bankruptcy Court. Therefore, the Bankruptcy Court's decision is **AFFIRMED.**

SO ORDERED THIS 25th day of May, 1993.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

[3] *That finding was made, in part, based on the Trustee's assessment of the claim. For example, the Trustee stated: "I don't think the estate has any interest in this claim or claims. The reason for that is this: There's only one creditor in these cases and that's F&M. If I were to take on the claim as my own and prevail, then the significance of that is that not only is the bank not a creditor of this debtor, but that, in fact, the bank owes the debtor money. And all I would be doing is recovering money and paying myself a trustee and/or attorney fee and given the rest of the money back to the debtor. I'm not serving any identifiable constituency...This, to me, is a dispute between the bank and the debtor. Transcript at page 7. (emphasis added).*

ENTERED ON DOCKET

DATE 5-26-93

FILED

MAY 25 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DR. HOWARD BOOS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 92-C-139-E**
	)	
THE HANOVER INSURANCE CO.,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

NOW before the Court is the Stipulation of Dismissal of the parties to this action requesting that this case be dismissed with prejudice. Upon review of the Stipulation and the file herein, this Court finds that dismissal should be granted.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that all claims and causes of action raised in this matter be, and they hereby are, dismissed with prejudice.

/s/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

Frank B. Wolfe, OBA #9825
Randall J. Snapp, OBA # 11169
NICHOLS, WOLFE, STAMPER,
NALLY & FALLIS, INC.
400 Old City Hall Building
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAROL JANE AKIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	92-C-218-E
	)	
LOUIS W. SULLIVAN,	)	
	)	
Defendant.	)	

ORDER

Plaintiff Carol Jane Akin received Social Security benefits in 1981. However, in 1990, the Secretary stopped the benefits, concluding that Akin could return to work. Akin now appeals that decision. For the reasons discussed below, the decision is **affirmed.**

I. Summary of Evidence/Procedural History

Plaintiff Carol Jane Akin was awarded Title II disability benefits as of February 17, 1981. *(Tr. 60, 79.)*[1] Akin received the benefits due to "end stage renal failure" requiring dialysis treatments *(Tr. 176-217, 219, 221-310).* On November 9, 1982, she also underwent a kidney transplant *(Tr. 311-14).*

Pursuant to 42 U.S.C. § 423(f)(1), the Secretary may terminate benefits if substantial evidence shows enough medical improvement so the claimant can work.[2] In

[1] *Tr. refers to the Secretary's official transcript.*

[2] *42 U.S.C. §423(f) states: "A recipient of benefits under this title...may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by (1) substantial evidence which demonstrates that (A) there has been any medical improvement in the individual's impairment or combination of impairments...and (B) the individual is now able to engage in substantial gainful activity..."*

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August of 1990, the Secretary stopped Akin's benefits, concluding that Akin's health had improved and that she could work. *(Tr. 71, 79)*. That decision was made after a hearing before the Administrative Law Judge ("ALJ"). Below is a summary of the evidence at the hearing.

At the time of the hearing, Akin was 44 years old. She has a Master's degree and was a public school art teacher for nine years prior to her disability in 1981. Akin also attended a year of law school in 1987-1988.

At the hearing, Akin testified that she can lift 10 pounds; sit and stand for an hour or two without interruption; and walk a mile when her knees do not bother her, but not even three or four feet otherwise. *Tr. 39, 43, 46-47.* She further testified that her knees are "always" swollen and that she must sit for up to two hours after being on her feet for that long, elevating her legs above the level of her heart, to bring her knee swelling down. *Tr. 34 ,39.*

Akin stated that she had no side effects from her kidney transplant. However, she noted that the medication creates a variety of side effects, including "swelling, edema, weakness in my knees" and "blurred vision." *Tr. 35.*[3] Akin also testified that she lacks the stamina to work eight hours a day, 40 hours a week. She said that she can only work a maximum of three to four hours a day and cannot maintain a predictable routine owing to day-to-day variations in how she feels. Tr. 44-45.

Akin, attended law school full-time in 1987-1988. She completed 30 hours. She testified that, during law school, she continued doing her daily activities such as

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[3] *Akin testified that she had "significant" problems with her blurred vision. She also testified that she is unable to read when her vision is blurred. Tr. at 35.*

housekeeping and laundry. Akin said she quit law school for two reasons: she had difficulty in keeping pace and because of her grades. *Tr. 32-3, 49.* In addition, Akin took an eight-day trip to Austria in 1987.

Medical evidence in the record includes a 10-year span from 1981 to 1991. The pertinent evidence, however, is found in medical examinations administered immediately before 1990 when the benefits were stopped. Below is a summary of that evidence.

In April of 1990, Dr. William J. Flanigan examined Akin. He wrote:

> **This 44 year old lady underwent cadaver kidney transplant under my direction on 11-9-82. She has done well and has not had major problems since kidney transplantation. I last saw her on 2-6-90 at which time she was normotensive...Her ability to carry out such activities as sitting, standing, moving about, lifting, carrying, handling objects, hearing, speaking, and traveling are not impaired.** *Tr. 474.*[4]

Dr. Flanigan also discussed Akin's health in a January 18, 1991 letter. *Tr. 486.* He stated that Akin did have "steroid-induced cataracts bilaterally but these do not prevent her from reading normal type or newspaper print." He also wrote that "her current dose of Prednisone is not one usually associated with steroid myopathy."

Dr. William Smith, M.D. examined Akin on June 26, 1990. He found that Akin's immunosuppressive therapy has put her at "some risk of infection problems" Tr. 477.[5] In addition, he noted that Akin stated her "stamina was relatively fair" but that she was unable to qualify this observation. *Tr. 475.*

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[4] *Dr. Bruce R. Stivers, seeing her in 1987 for her knee problems, advised her at that time to exercise caution in negotiating stairs; to limit kneeling and squatting; and to avoid running, jumping, walking across uneven ground, and carrying of any heavy items (Tr. 318-19).*

[5] *The evidence also shows that Akin has engaged in activities involving exposure to the public, such as schooling, shopping and volunteer work, without any severe infections in years (Tr. 32-3, 38, 49-50, 475).*

The Vocational Expert also testified. In response to the ALJ's hypothetical questions, the Vocational Expert testified that Akin could work at jobs such as a commercial artist, teacher's aide, library clerk and reservation clerk.[6]

After the hearing, the ALJ found that Akin had medically improved and that she could return to work in the jobs discussed above by the Vocational Expert. He further concluded that her disability stopped on August 31, 1990. Akin now appeals that decision.

II. Legal Analysis

This issue requires a two-step analysis as discussed in 42 U.S.C. §423(f)(1). First, does substantial evidence support the Secretary's decision that Akin's medical condition has improved? Second, if her condition has improved, is she able to engage in substantial gainful activity.

A. Has Akin's Medical Condition Improved?

In August of 1981, the Secretary found Akin to be disabled due to her kidney condition. Nine years later, in August of 1990, the Secretary terminated benefits. Therefore, the first question is whether substantial evidence supports the ALJ's finding that Akin's physical condition improved since the 1981 award of disability benefits. *Nelson v. Sullivan,* 946 F.2d 1314, 1315 (8th Cir. 1990).

Substantial evidence is "more than a scintilla." It means relevant evidence that a reasonable mind deems adequate to support a conclusion." *Jordan v. Heckler,* 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" will be entered only

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[6] *The ALJ first asked the Vocational Expert to evaluate Akin's past work as a public school art teacher. The Vocational Expert stated that Akin could not do that job because she would have to lift more than 10 pounds. The ALJ then asked: "With somebody with this type of educational background, would there be jobs that would be strictly -- where they wouldn't have to involve any more than 10 pounds of lifting and where they could vary their position some, where they'd be moving around a little bit but not excessively."*

where there is a conspicuous absence of credible choices or no contrary medical evidence. *Trimiar v. Sullivan,* 966 F.2d 1326, 1332 (10th Cir. 1992).

In this case, the record clearly shows that Akin's physical condition has improved. In 1981, Akin had end stage renal failure requiring dialysis treatment. In 1982, she underwent a kidney transplant. However, in 1990, Akin did not have end stage renal failure and no longer needs dialysis treatment. In addition, as indicated by Drs. Flanigan and Smith, her kidney transplant was successful. Furthermore, Akin has presented no objective or medical except portions of her testimony on this issue.[7] Therefore, substantial evidence supports the ALJ's finding that Akin's medical condition has improved.

B. Does Substantial Evidence Support the ALJ's Decision That Akin Could Return To Work?

Since Akin's medical condition has improved, the next question is whether substantial evidence supports the ALJ's finding that Akin could return to work. The ALJ found that Akin could not return to her past relevant work as an art teacher. However, he did conclude that she could work as a commercial artist, teacher's aide, library clerk and reservation clerk. The pertinent regulation is Step 8 of 20 C.F.R. §404.1594(f). It states:

> **If you are not able to do work you have done in the past, we will complete one final step. Given the residual functional capacity assessment and considering your age, education and past work experience, can you do other work? If you can, disability will be found to have ended. If you cannot, disability will be found to continue.**

Akin's primary argument is that the ALJ placed too much emphasis on her law school attendance and her eight-day vacation to Austria. Intertwined in that argument is

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[7] *Akin testified that she had various side effects concerning the aftermath of the kidney transplant (i.e. side effects of medication, other physical ailments such as knee problems and visual blurs. However, the ALJ discounted much of her testimony to the extent it was not supported by other evidence. This was proper. The decision as to whether an individual's condition has improved is primarily a factual inquiry, which depends on witness credibility. Determinations of credibility are the ALJ's responsibility.* Nelson *supra, at 1316.*

whether the ALJ's hypothetical questions were proper.

Exactly how much emphasis placed on Akin's law school attendance and vacation to Austria is unclear from the record. Clearly, the ALJ considered both to be important factors. However, his written decision also indicates that he examined other factors.

The ALJ examined Akin's testimony, taking into account her volunteer work, her year at law school, her daily activities and her vacation. The ALJ, however, also discounted Akin's credibility. Writes the ALJ:

> **The undersigned finds that the claimant's subjective allegations of disabling pain are not credible for the following reasons. The claimant apparently has continued to live a normal life since receiving her kidney transplants. She no longer requires hemodialysis. She has had no renal problems since her transplant in November 1982. She has been able to attend computer school and law school and was limited solely by the difficulty of the subject matter. The record indicates that claimant has been doing some heavy lifting, and had an injury in 1987 when carrying laundry downstairs. She has taken a trip to Austria which was listed as an 8-day trip. She has volunteered for school...The claimant was unable to pinpoint a precise reason why she could not work other than to say that she did not think she would have the stamina to work an 8-hour day, but she has the stamina to go to school, take care of her house and do her cooking and to, in effect, live a normal life. The undersigned believes that if the claimant can live a normal life, she can perform sedentary work.** *Tr. at 16.*

In addition to reviewing Akin's testimony, the ALJ also discussed the medical evidence, including the statements of Drs. Flanigan and Smith. That medical evidence does not substantiate Akin's alleged impairments. For example, Dr. Flanigan stated that Akin was able to **"carry out such activities as sitting, standing, moving about, lifting, carrying, handling objects, hearing, speaking, and traveling."** Dr. Flanigan also stated that Akin was not prevented from reading and he did not indicate any medication side effects. In addition, Dr. Smith did not find problems with Akin's stamina.

A third parcel of evidence concerned the Vocational Expert's testimony. Testimony taken from the Vocational Expert must be in response to questions that relate **"with precision all of a claimant's impairments"**. *Hargis v. Sullivan*, 945 F.2d 1482 (10th Cir. 1991).

The dispute here focuses on the fact that the ALJ did not include all of Akin's alleged impairments in his hypothetical question. However, the ALJ only has to incorporate impairments which he believes are true. *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). He specifically rejected part of Akin's testimony concerning her impairments because he found the statements not to be credible.[8] In addition, no medical evidence supported Akin's complaints (i.e. medication side effects, severe blurred vision, stamina)[9] Therefore, the hypothetical question was proper.

The foregoing shows that the ALJ considered several pieces of evidence, including -- but not limited to -- the Vocational Expert's testimony, Akin's law school attendance and Akin's vacation to Austria. Such activities as law school attendance and vacation may be considered, along with the other evidence, in determining whether a person is entitled to disabling benefits. *See, Gossett v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988). Therefore, substantial evidence supports the ALJ's finding that Akin could engage in a substantial gainful activity.

III. Conclusion

Pursuant to 42 U.S.C. §423(f)(1), the Secretary may terminate disability benefits

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[8] *Credibility determinations are "peculiarly the province of the finder of fact". Such determinations cannot be upset when they are supported by substantial evidence. Diaz v. HHS, 898 F.2d 774, 777 (10th Cir. 1990).*

[9] *It should be noted that Akin's brief makes little reference to the medical evidence to support her argument.*

if 1) the claimant's medical condition has improved, and 2) If claimant's improved medical condition allows her to engage in substantial gainful activity. The Secretary terminated Akin's benefits after finding that both prongs had been met.

The question, on appeal, is whether substantial evidence supports the Secretary/ALJ's findings. After an examination of the record, this Court finds that substantial evidence supports the decision. The evidence indicates that Akin's medical condition improved, and that Akin could return to work. Such evidence includes the medical reports, the testimony of the vocational expert and to, some extent, the testimony of Akin. Therefore, the Secretary's decision is AFFIRMED.

SO ORDERED THIS 25th day of May, 1993.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CARL J. RUCKMAN, Plaintiff,	)	
v.	)	92-C-0174-E
SECRETARY OF HEALTH & HUMAN SERVICES, Defendant.	)	

ORDER

Plaintiff Carl J. Ruckman is appealing the Secretary's denial of Social Security benefits.[1] The Secretary found that Mr. Ruckman could return to his past relevant work as a welder.

Mr. Ruckman raises two issues: 1) Whether substantial evidence supports the Administrative Law Judge's ("ALJ") finding that Ruckman could return to work as a welder; and 2) Whether the ALJ's hypothetical question to the vocational expert was proper. For the reasons discussed below, the court remands the case for further proceedings consistent with this Order.

I. Summary of Evidence

Plaintiff, who has a 10th grade education, was 50 years old at the time of the hearing. He last worked in 1980, but said he had to quit due to migraine headaches and alcohol. Plaintiff has had a long history of alcohol dependence. At one point, he says he

[1] *Plaintiff filed his applications for disability benefits under Titles II and XVI of the Act on January 22 and 29, 1990, respectively, alleging disability since July 1, 1980, due to a head injury (Tr. 58-60, 61-64). After a hearing, the Administrative Law Judge ("ALJ") denied benefits to Plaintiff on August 2, 1991. On February 5, 1992, the Appeals Council declined to review the decision of the ALJ (Tr. 3-4).*

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drank as much as a fifth to one-half gallon of wine daily. When asked about why he was disabled, Plaintiff testified:

> **Well, they're both [headaches and drinking] both major problems...I have headaches, I don't think I can quit drinking as long as I have the headaches. I don't want to take narcotics...I know alcohol is just as bad as narcotics but it don't seem as bad to me...I wouldn't want to be a heroin addict or nothing like that. But if I get the headaches stopped, I believe I'd have a chance of quitting drinking.** *Tr. at 46.*[2]

On April 5, 1990, John D. Hesson, M.D. examined Plaintiff for complaints of severe headaches (Tr. 134-37). Plaintiff indicated that he underwent restorative nasal surgery in 1970 and that he had headaches (three to five times per week) (Tr. 134) since then. Dr. Hesson stated that he had seen Plaintiff six times (beginning in October 1989), and that each time he had a strong odor of alcohol on his breath. Examination revealed no true musculo-skeletal deformity or range of motion limitation (Tr. 135). Dr. Hesson's impressions included chronic alcoholism, allergic rhinitis, probable narcotic dependence, and a history of cervical and lumbar strain, resolved (Tr. 136).

On December 10, 1990, Plaintiff was given a consultative psychological examination by Larry Vaught, Ph.D. (Tr. 153-55). Plaintiff related a history of fairly severe headaches, occurring 2 to 3 times monthly, lasting from 3 to 5 days (Tr. 153). Plaintiff denied hallucinations or delusions, and his mood was mildly depressed.

Dr. Vaught also assessed that Plaintiff was mildly depressed. (Tr. 154). Dr. Vaught further stated that Plaintiff's psychosocial stressors were moderate in severity, and that he was capable of managing benefit payments in his own best interest (Tr. 154-55).

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[2] *"Tr." refers to Transcript pages of the official record from the Secretary.*

On December 21, 1990, Ronald C. Passmore, M.D., administered a psychiatric examination (Tr. 156-63). Plaintiff said he did not hear voices and acknowledged use of alcohol, but did not believe that he was alcohol-dependent (Tr. 156). Plaintiff was not on any medication (Tr. 157). A mental examination revealed that Plaintiff had no "looseness of association", "flight of ideas", "hallucinations", or "delusions". Dr. Passmore stated that "it appears that Plaintiff has a problem with alcohol."Id.

Cheryl Mallon, a Vocational Expert, also testified. She was asked a series of hypothetical questions by the ALJ. **The ALJ did not include Plaintiff's alcoholism in any of his hypothetical questions.** He did, however, take judicial notice of the alcoholism.

Mallon testified that she reviewed the Vocational Reports of record and had heard the evidence presented at Plaintiff's hearing testimony (Tr. 51). She further testified that Plaintiff could perform a significant number of light unskilled assembly and truck driver jobs in the regional economy (Tr. 52-53). Ms. Mallon also testified that Plaintiff could not perform any job if his testimony were true about his headaches, i.e., that he had to lie down in a dark place approximately three times a month (Tr. 54-55).

After the hearing, the ALJ concluded that Plaintiff could return to his past relevant work as a welder. On February 5, 1992, the Appeals Council declined to review the decision of the ALJ (Tr. 3-4). Plaintiff subsequently brought this appeal.

II. Legal Analysis

When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the

claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation;[3] (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. *20 C.F.R. § 404.1520(b)-(f) (1991).* If the Secretary finds the claimant disabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).[4]

In this case, the ALJ stopped at the fourth step by finding that Plaintiff could return to work as a welder. Plaintiff refutes that finding, raising two issues: 1) That Plaintiff's past relevant work does not include welding; and 2) That the ALJ erred in his hypothetical question to the Vocational Expert.

A. Plaintiff's Past Relevant Work As A Welder

Plaintiff contends that his work as a welder does not qualify as past relevant work. Past relevant work is defined as work that: 1) occurred within the past 15 years; 2) was of sufficient duration to enable the worker to learn to do the job; and 3) was substantial gainful employment. *Jozefowicz v. Heckler,* 811 F.2d 1352 (10th Cir. 1987).

Plaintiff testified that he worked as a welder for "probably two weeks" in 1980. He also testified that he worked in welding during the 1960s. However, on page 82 of the transcript, Plaintiff noted that he had worked from 1965 to 1980 as a welder at Knight Industries. This record conflicts with the testimony taken, and nowhere is this record made clear. The ALJ failed to adequately develop the record on this issue and did not elaborate

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[3] *Appendix 1 is a listing of impairments for each separate body system. 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991).*

[4] *Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. § 405(g). The undersigned's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). The court "may not reweigh the evidence or try the issues de novo or substitute its judgment for that of the Secretary." Pierre v. Sullivan, 884 F.2d 799, 802 (5th Cir. 1989).*

on it in his opinion.

Since the record is unclear and since the ALJ did not properly develop the record, this Court cannot determine whether Plaintiff's work as a welder was either recent enough or of a long enough duration to constitute past relevant work or whether it was "substantial". More facts are needed before such a determination can be made.

B. Alcoholism and the ALJ's Hypothetical Questions

Alcoholism, alone or in combination with other impairments, can be a disabling condition. *Metcalf v. Heckler*, 800 F.2d 793, 796 (8th Cir. 1986). To establish such a disability, however, a claimant must show that 1) he has lost self-control to the extent of being unable to seek and use means of rehabilitation, and 2) that his disability is encompassed by the Social Security Act. *Shelltrack v. Sullivan*, 938 F.2d 894, 897 (8th Cir. 1990).

In this case, the record indicates that the ALJ did not fully consider whether alcoholism prevented Plaintiff from working. On page 18 of the Transcript, the ALJ writes: **"In the instant case, claimant states that headaches prevent him from working, not his alcohol addiction."** Since Plaintiff lists "head injury" as the reason for his disability on page 61 of the Transcript, the ALJ had reason to make such a statement. However, it is undisputed that Plaintiff suffers from severe alcoholism, and, therefore, it should have been more carefully examined by the ALJ.[5]

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[5] *A most curious statement by the ALJ is this: "Claimant has testified that he drinks up to one-fifth of alcohol per day. Claimant testified that he does this to assist him in sleeping and for pain relief from his headaches. However, the Administrative Law Judge notes that the claimant states he has headaches two to three times a month and they last three to five days. Therefore, for pain relief, claimant would not have to drink a fifth of alcohol a day for the full month. Transcript at page 18. Further, the ALJ takes "judicial notice" of Plaintiff's alcoholism, but in no wise refers to it in the hypothetical question given the V.E., in effect ignoring several mental health professionals.*

Further evidence of the ALJ's failure to adequately consider Plaintiff's alcoholism appears in the hypothetical questions. Testimony elicited by such questions must relate with precision all of a claimant's impairments in order to constitute substantial evidence supporting the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482 (10th Cir. 1991).

In this case, the ALJ made no mention of alcoholism in his questions to the vocational expert. Arguably, the Vocational Expert did not even consider the Plaintiff's alcoholism in her testimony.[6] Given the record, the ALJ's failure to reference alcoholism in his hypothetical inquiry of the V.E, is error. Any hypothetical questions concerning this Plaintiff should have included his alcohol-related problems.[7]

III. Conclusion

Two major problems exist with the Secretary's decision in this case. First, the ALJ failed to adequately develop the record concerning whether Plaintiff's past relevant work, as defined by case law, was as a welder; i.e. whether it was of sufficient duration and/or within the past fifteen (15) years. Therefore, this Court cannot fairly make a decision on this issue.

The second problem is that the ALJ failed to adequately consider Plaintiff's alcoholism when examining the disability claim. It appears that he did not even analyze the impairment to determine if it met or equalled a listing in Appendix 1, Subpart P, Regulations No. 4. In addition, the impairment was not adequately examined in

---

[6] *The Vocational Expert attended Plaintiff's hearing, and, as a result, could have heard testimony concerning Plaintiff's alcoholism. But this Court has no way knowing if, or to what extent, she considered that factor in her answers to the ALJ. However, it should be noted that the Vocational Expert stated that Plaintiff could not return to work when answering a question from Plaintiff's counsel.* Tr. *at 55.*

[7] *As noted earlier, the evidence clearly shows that Plaintiff has a severe alcohol problem. In addition, this Court is persuaded, in part, by a federal district court decision in Colorado. That court, faced with similar facts, remanded the case to allow the Vocational Expert to consider the claimant's problems with alcoholism.* Trujillo v. Sullivan, *1991 WL 80502 (D. Colo. May 13, 1991).*

relationship to whether Plaintiff could return to his past relevant work. On remand, the ALJ must thoroughly examine Plaintiff's alcohol-related problems in making a determination on whether he is disabled, consistent with this Order.

Consequently, this Court **REMANDS** the case to the ALJ. A supplemental hearing shall be conducted to gather more facts concerning Plaintiff's past relevant work, as above. In addition, both a medical and/or mental health expert and a Vocational Expert shall testify concerning Plaintiff's alcoholism, and its effect on his physical and mental health and capability to function in the workplace.

SO ORDERED THIS 25th day of May, 1993.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 5-26-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 25 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ADDIE CLAYTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	**CIVIL ACTION NO. 92-C-1173-E**

ORDER

This matter comes on before the court upon the stipulation of all parties and the court being fully advised in the premises **ORDERS, ADJUDGES AND DECREES** that all claims asserted herein by plaintiff, Addie Clayton, against the defendant, United States of America, are hereby dismissed with prejudice.

Dated this 24th day of May, 1993.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:

WYN DEE BAKER, OBA# 465
Assistant United States Attorney
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATHLEEN LOGAN, Plaintiff,	)	
vs.	)	Tulsa County Case No: CJ-92-3412
AETNA CASUALTY AND SURETY COMPANY, a foreign corporation, Defendant.	)	Case No: 92-C-730-B

STIPULATION OF DISMISSAL WITH PREJUDICE OF PLAINTIFF'S FIRST CAUSE OF ACTION

COMES NOW the Plaintiff, Kathleen Logan, and Defendant Aetna Casualty and Surety Company, and stipulates, pursuant to Rule 41(a)(1)(ii) that Plaintiff's First Cause of Action, in her Amended Complaint, is hereby dismissed with prejudice.

Respectfully submitted

Gary W. Wood, #9843
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONALD J. BARNES, Plaintiff, -vs- MISSOURI PACIFIC RAILROAD COMPANY, d/b/a UNION PACIFIC RAILROAD COMPANY, Defendant.	)	No. 91-C-872-B

STIPULATION ~~FOR~~ OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Donald J. Barnes, and the Defendant, Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company, by and through their attorneys of record and pursuant to Fed. R. Civ. P. 41, file this Stipulation of Dismissal dismissing with prejudice all claims raised by the Plaintiff, Donald J. Barnes, against Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company in the case styled Donald J. Barnes v. Missouri Pacific Railroad Company d/b/a/ Union Pacific Railroad Company, Case No. 91-C-872-B, filed in the United States District Court for the Northern District of Oklahoma, for the reason that the parties have compromised and settled all matters in controversy.

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ATTORNEYS FOR DEFENDANT

ENTERED ON DOCKET

DATE 5-25-93

FILED

MAY 25 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

WEBCO INDUSTRIES, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 92-C-838-E
	)	
TIOGA PIPE SUPPLY COMPANY, INC.	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated by and between the Plaintiff, Webco Industries, Inc., and Defendant, Tioga Pipe Supply Company, Inc., that this action and all claims for relief which were or could have been alleged therein be and hereby are dismissed with prejudice.

DATED May 21, 1993.

Frederick J. Hegenbart

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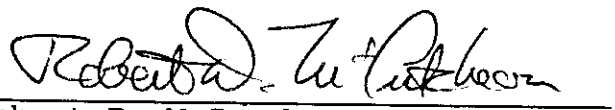

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ATTORNEYS FOR DEFENDANT,
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RDM\T-V\TIOGA\STIPULA.DWP

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff, v. AMERICAN AIRLINES, INC., et al., Defendants. AND CONSOLIDATED ACTIONS	Consolidated Case Nos. 89-C-868 B 89-C-869 B 90-C-859 B

ORDER APPROVING MAGISTRATE'S REPORT & RECOMMENDATION PERTAINING TO MOTION FOR DEFAULT JUDGMENT AS TO CROSS-CLAIMS

NOW on this 24 day of May, 1993, this matter comes on for consideration of the MOTION FOR DEFAULT JUDGMENT AS TO CROSS-CLAIMS (DOCKET NO. 608) filed herein on January 29, 1993 by all Defendants other than those identified in Section II below, against the Defendants identified in Section II below. The Defendants who filed the instant Motion are hereinafter referred to as the "Moving Defendants", and the Defendants identified in Section II below are hereinafter referred to as the "Defaulting Defendants". The Plaintiff appears by its attorney Gary A. Eaton, the Moving Defendants appear by their respective lead counsel, William Anderson appears as Liaison Counsel, and the Defaulting Defendants do not appear. The Court, having examined the files and records and proceedings herein, having reviewed and considered the Magistrate's Report and Recommendation, and being fully advised and informed in the premises, FINDS AND ORDERS as follows:

I.

The Magistrate's Report and Recommendation resulting from the hearing on the MOTION FOR DEFAULT JUDGMENT AS TO CROSS-CLAIMS (DOCKET NO. 608) on February 26, 1993, should be and hereby is approved.

II.

Default judgment should be entered on the Moving Defendants' filed and deemed filed Cross-claims against the following Defaulting Defendants:

1. Consolidated Cleaning Service Company, Inc.
2. Joseph F. Burke, Inc., a/k/a The Joseph F. Burke Corporation
3. Judson Webb
4. Kenworth of Arkansas, Inc.
5. LeRoy Street
6. Madewell Metal Corp.
7. Muskogee Ford-Lincoln Mercury, Inc.
8. Powell Sanitation, Inc.
9. Recyclon Corporation, a/k/a Recyclon, Inc.
10. Resource Recovery & Refining Corp.
11. Ronnie F. Ready, d/b/a Ready Tank Company
12. Sam W. Hays, d/b/a Star Auto Garage & Service
13. Solvents Recovery Corporation
14. T. Lee Company
15. Tri-Container, Inc.

III.

The default judgments should not set the amount of money damages, but rather should bar the Defaulting Defendants from asserting any defenses to the allegations in the Moving Defendants' filed and deemed filed Cross-claims.

IV.

The amounts of actual judgments, and the portion of any joint and several judgment to be paid by any of these Defaulting Defendants, should be deferred until subsequent phases of this case.

V.

The default judgments entered herein are limited to the 15 Defaulting Defendants listed in Section II above, and are not binding on any other party on any issue.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Approved as to form:

William C. Anderson
Liaison Counsel

Gary A. Eaton
Counsel for Plaintiff

Michael Graves
Lead Counsel Group I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff, v. AMERICAN AIRLINES, INC., et al., Defendants. AND CONSOLIDATED ACTIONS	Consolidated Case Nos. 89-C-868 B 89-C-869 B 90-C-859 B

DEFAULT JUDGMENT AND ORDER

NOW on this 24 day of May, 1993, this matter comes on for consideration of the MOTION FOR DEFAULT JUDGMENT AS TO CROSS-CLAIMS (DOCKET NO. 608) filed herein on January 29, 1993 by all Defendants other than those identified in Section I below, against the Defendants identified in Section I below. The Defendants who filed the instant Motion are hereinafter referred to as the "Moving Defendants", and the Defendants identified in Section I below are hereinafter referred to as the "Defaulting Defendants". The instant Motion was presented to Magistrate John Leo Wagner on February 26, 1993. The Plaintiff appears by its attorney Gary A. Eaton, the Moving Defendants appear by their respective lead counsel, William Anderson appears as Liaison Counsel, and the Defaulting Defendants do not appear. The Court, having examined the files and records and proceedings herein, having reviewed and considered the Magistrate's Report and Recommendation, and being fully advised and informed in the premises, FINDS, ADJUDGES, ORDERS AND DECREES:

I.

The Magistrate's Report and Recommendation resulting from the hearing on the MOTION FOR DEFAULT JUDGMENT AS TO CROSS-CLAIMS (DOCKET NO. 608) on February 26, 1993, is approved, and default judgment is hereby entered for the Moving Defendants and against the following Defaulting Defendants:

1. Consolidated Cleaning Service Company, Inc.
2. Joseph F. Burke, Inc., a/k/a The Joseph F. Burke Corporation
3. Judson Webb
4. Kenworth of Arkansas, Inc.
5. LeRoy Street
6. Madewell Metal Corp.
7. Muskogee Ford-Lincoln Mercury, Inc.
8. Powell Sanitation, Inc.
9. Recyclon Corporation, a/k/a Recyclon, Inc.
10. Resource Recovery & Refining Corp.
11. Ronnie F. Ready, d/b/a Ready Tank Company
12. Sam W. Hays, d/b/a Star Auto Garage & Service
13. Solvents Recovery Corporation
14. T. Lee Company
15. Tri-Container, Inc.

II.

This default judgment does not set the amount of money damages, but rather bars the Defaulting Defendants from asserting any defenses to the allegations in the Moving Defendants' filed and deemed filed Cross-claims.

III.

The amounts of actual judgments, and the portion of any joint and several judgment to be paid by any of these Defaulting Defendants, shall be deferred until subsequent phases of this case.

IV.

The default judgments entered herein are limited to the 15 Defaulting Defendants listed in Section II above, and are not binding on any other party on any issue.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Approved as to form:

William C. Anderson
Liaison Counsel

Gary A. Eaton
Counsel for Plaintiff

Michael Graves
Lead Counsel Group I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALVIN L. WICKS, SR.,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

No. 93-C-362-B

ORDER

Petitioner has submitted an application for a writ of habeas corpus, along with numerous exhibits and papers. However, Petitioner has not submitted the proper filing fee or a motion for leave to proceed in forma pauperis. See Local Rule 6(A). In addition, the instant petition is not on a proper court-approved form. See Local Rule 5(A). Furthermore, Petitioner's action appears to be frivolous.

Petitioner's action is accordingly **dismissed.**

SO ORDERED THIS 10 day of May, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LAMAR F. BANKS,

Plaintiff,

vs.

THE CITY OF TULSA, a governmental subdivision of the State of Oklahoma, and DENNIS LINDEMANN, an individual

Defendants.

Case No. 92-C-225E

JOURNAL ENTRY OF JUDGMENT

NOW, on this 24th day of May, 1993, this matter comes before this Court pursuant to request by the parties. This Court having examined the pleadings filed herein, having heard statements of counsel and being fully apprised in the premises finds as follows:

1. This Court has jurisdiction of parties in the subject matter of this action.
2. Parties have entered into an agreed settlement of all Plaintiff's claims against the Defendants herein.
3. Pursuant to said agreement, the Plaintiff shall have judgment against the City of Tulsa for Seventy-Five Thousand Dollars ($75,000.00).
4. The Plaintiff has dismissed all of his claims against the Defendant Dennis Lindemann with prejudice.
5. Said judgment against the City of Tulsa represents all of Plaintiff's claims as of May 5, 1993. Said claims include but are not limited to any claim against the Defendants based on federal law, state tort law, and the

State Workers Compensation statutes, whether claims are known or not known.

6. Said judgment does not include any amount as wages to the Plaintiff but includes personal injury, accidental injury, interests, costs and attorney fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Lamar F. Banks, has judgment against the Defendant City of Tulsa in the amount of Seventy-Five Thousand ($75,000.00).

IT IS THEREFORE FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the suit of the Plaintiff against the Defendant Dennis Lindemann is hereby dismissed with prejudice.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

Approved:

Timothy S. Gilpin
Attorney for Plaintiff

Kevin R. Kelley
Attorney for Plaintiff

Lamar F. Banks
Plaintiff

Charles R. Fisher
Attorney for Defendants

Robert H. Garner
Attorney for Defendants

ENTERED ON DOCKET

DATE 5-25-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 24 1993

RICHARD M. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

BERNARDINE G. THEIS, Administrator of the Estate of Patrick A. Theis, Deceased,

Plaintiff,

vs.

GARRETT ENGINE DIVISION OF ALLIED-SIGNAL, INC.,

Defendant.

No. 93-C-145-E

ORDER OF DISMISSAL

The Court has for consideration the Motion to Dismiss filed by Defendant Mitsubishi Heavy Industries Ltd. (docket #9). Plaintiff sent the Complaint and summons herein, to Defendant Mitsubishi in Japan by way of registered mail; therefore she failed to comply with the service of process requirements of the Hague Convention. Plaintiff avers that Article 10(a) of the Convention permits service by registered mail. The Court is persuaded that it does not. Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989). The Court, therefore lacks in personam jurisdiction over this Defendant and its Motion to Dismiss must be granted.

ORDERED this 19th day of May, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PEGGY J. NEECE and BUEL H. NEECE, Plaintiffs, vs. INTERNAL REVENUE SERVICE OF THE UNITED STATES OF AMERICA, UNITED STATES OF AMERICA AND FIRST NATIONAL BANK OF TURLEY, N.A., Defendants.	)	No. 88-C-1320-E

FINDINGS OF FACT, CONCLUSIONS OF LAW ORDER AND JUDGMENT

This is an action for interpreting and enforcing provisions of the Right to Financial Privacy Act, 12 U.S.C. §3401, et seq. and the Tax Reform Act of 1976, 26 U.S.C. §7609. Plaintiffs have alleged wrongful disclosure by Defendant Bank to Defendant IRS of certain of Plaintiffs' bank records.

In 1989 the Court denied Plaintiff's motion for partial summary judgment and granted Defendant's motion for summary judgment. In 1991 the Tenth Circuit reversed and remanded. The issue on appeal was:

> whether a bank can voluntarily turn over documents to the IRS absent notification to the bank customer without violating the Right To Financial Privacy Act (RFPA) 12 U.S.C. §3401 et seq.

The Tenth Circuit noted that RFPA generally prohibits disclosure absent customer notice. Under specified regulatory procedures, Section 3413 of the Act provides for certain exceptions to the

notice provisions, for example: where authorized by the Internal Revenue Code and in compliance with that Code's procedures. The relevant procedures under the Code also provide for customer notice (26 U.S.C. §7609). Read together these two statutes evince a congressional intent to protect the privacy interests of citizens and in Section 7609 of the Code and the RFPA, Congress focused especially on bank records. In this case, the Tenth Circuit held that the IRS was not relieved of the procedural requirement of RFPA simply because the bank voluntarily turned over the records to the IRS. The Circuit therefore reversed the order granting Defendant's motion for summary judgment but did not reverse the order denying Plaintiff's motion for partial summary judgment because the record needed to be developed especially on the issue of whether the good faith defense of 12 U.S.C. §3417(c) is available to the Defendant Bank. The Circuit therefore remanded.

The Plaintiffs seek damages under the Right To Financial Privacy Act in the following particulars:

1. $100 against each defendant in statutory damages pursuant to the Act at Section 3147;
2. Actual damages sustained in excess of the amount of $1,200,000;
3. $100,000,000 in punitive damages for the alleged willful or intentional violation of the Act;
4. Costs and fees.

Defendants:

1. Admit liability for the $100 in statutory damages;
2. Deny that there is a causal nexus between Defendants'

actions and any actual damages alleged by Plaintiffs. (Defendants also assert that the actual damages alleged are too speculative in nature to justify an award);

3. Contend that attorney fees and costs relating to the jeopardy assessment were disallowed by the Court in the prior case: no. 88-C-1055-E and are, therefore, res judicata;

4. Deny that Plaintiffs are entitled to punitive damages; and

5. Also contend that the disclosures were not in violation of the Act.

The matter was heard by this Court on February 2, 3 and 4, 1993. The Court has considered all the testimony and evidence offered at trial, together with the statements of the counsel and the documents of record and now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. During the time periods relevant to this trial, Mikel Hoffman was President of the First Bank of Turley, in Tulsa, Oklahoma and the Plaintiffs Peggy J. Neece and Buel H. Neece were customers of the bank.

2. Buel H. Neece was convicted in March, 1986 of willfully attempting to evade federal income taxes for the years 1979 through 1981.

3. On November 9, 1987 Mr. Neece telephoned Mikel Hoffman to

inquire about mortgaging his homestead as additional collateral for a commercial loan with the Bank. Mr. Hoffman was aware of Mr. Neece's conviction identified in paragraph 2, supra. Mr. Hoffman testified that Mr. Neece stated that the purpose of the proposed mortgage was to enable him to take an interest deduction for his commercial loan under the home equity law.

4. Mr. Hoffman testified he expressed concern to Mr. Neece over the propriety of said interest deduction and advised him to contact his accountant to see if it was legal. Mr. Neece responded that he has already consulted a tax professional.

5. Subsequently, Mr. Hoffman received the proposed mortgage through the mail from Mr. Neece. The mortgage had already been recorded in November, 1987 prior to the Bank's receipt of it on November 16, 1987.

6. After receipt of the mortgage, Mr. Hoffman wrote a memorandum to the bank files recording his recollection of the November 9, 1987 meeting and his receipt of the mortgage on November 16, 1987.

7. Mr. Hoffman testified that Mr. Neece told Mr. Hoffman that the Internal Revenue Service was getting ready to move against Mr. Neece and, therefore he felt it would be beneficial to have a mortgage on his homestead. Mr. Hoffman testified he informed Neece that he would need to file a residential real estate loan application with a financial statement showing sufficient income to pay back the loan.

8. Mr. Neece, then, hand-delivered loan application papers

to the Bank. Mr. Neece told Pauline Edens, Mr. Hoffman's secretary, that he wanted the loan for the purpose of paying the Internal Revenue Service. However, the loan application stated that the loan was for debt consolidation.

9. Mr. Hoffman contacted B.J. Smith, the Bank Chairman of the Board, related the foregoing facts, and advised that, in his opinion, it was time to call the authorities to notify them about the transaction proposed by Mr. Neece.

10. Mr. Hoffman called an Internal Revenue Agent he knew, and was referred to Gary Benuzzi, a Special Agent with the Internal Revenue Service. Mr. Hoffman telephoned Mr. Benuzzi regarding the incidents described above. Hoffman testified that he asked Benuzzi to keep his contact confidential.

11. Thereafter, on April 26, 1988, a meeting took place between Hoffman and Benuzzi at Hoffman's office at the Bank. At the meeting Benuzzi asked Hoffman for his file whereupon Hoffman inquired as to whether a subpoena was necessary. Benuzzi responded "no." Benuzzi testified he did not issue Hoffman an Internal Revenue Service administrative summons for the documents because it was the procedure of his office to issue a summons only when an agent has a numbered investigation file on the matter and Benuzzi currently had no such file on Buel Neece. Hoffman testified that he simply wanted verification of his belief that it was permissible for him to turn over the documents to the agent without a summons. Thereupon Hoffman delivered the requested materials to Benuzzi. The materials included the BHN Family Trust.

12. On April 27, 1988, Special Agent Benuzzi recommended to his superiors that a jeopardy assessment be made against Buel Neece.

13. The District Director in Oklahoma City, Oklahoma approved this recommendation and forwarded it to the Internal Revenue Service's service center in August, Texas.

14. This recommendation was returned to Benuzzi because Buel H. Neece and Peggy J. Neece had filed joint tax returns with respect to the involved tax liabilities and the initial recommendation was only against Buel H. Neece, individually.

15. Accordingly, Benuzzi submitted a superseding memorandum dated May 26, 1988, recommending a jeopardy assessment against Buel H. Neece and Peggy J. Neece, jointly. Between the time of the first recommendation and the second recommendation, Benuzzi also obtained recorded deeds in the land records of Tulsa County and Osage County whereby the Neeces were transferring their property. Benuzzi used this additional information in making his second jeopardy assessment recommendation.

16. The District Director for the Internal Revenue Service in Oklahoma sent a recommendation and a request to the Internal Revenue Service Center in August, Texas seeking a jeopardy assessment against Buel H. Neece and Peggy J. Neece. This document was dated May 26, 1988, and was approved by the District Director in Oklahoma on June 9, 1988, for forwarding to the Austin Service Center. On the basis of the May 26, 1988 request the Internal Revenue Service in Austin, Texas made an assessment on June 10,

1980 against Buel H. and Peggy J. Neece for the involved tax liabilities.

17. On June 15, 1988, after assessment of the involved tax liabilities, the Internal Revenue Service levied upon and seized assets located at the Neece homestead and farm which is situated outside of the residence.

18. Also on that date, the Internal Revenue Service levied upon bank accounts at the First National Bank of Turley under the control of the Neeces.

19. And on June 15, 1988, Connie Medlock, a revenue officer with the Internal Revenue Service who had responsibility for collecting the involved tax liabilities, served a summons upon the First National Bank of Turley. This summons demanded copies of checks from March 1, 1988 to June 15, 1988 relative to accounts at the Bank in the names of the BHN Family Trust I and II.

20. Pursuant to this summons, the Bank produced copies of all checks deposited in and drawn upon these accounts by mail on June 20, 1988.

21. In addition to the checks, the Bank produced monthly statements and deposit slips which were not specifically named in the summons but which were requested by prior verbal instructions from the Internal Revenue Service regarding how to comply with an Internal Revenue Service summons, (that is, when checks between certain dates were requested, checks drawn and checks deposited should be produced together with bank statements and deposit slips between the relevant dates as proof that all the requested checks

were included). No notice of this summons was given to Buel H. Neece or Peggy J. Neece.

22. On August 25, 1988, the Plaintiffs filed a civil action in this Court which was assigned the case number 88-C-1055-E. In their complaint, Plaintiffs prayed for an adjudication that the jeopardy assessment against Buel H. and Peggy J. Neece was void.

23. At the trial of case no. 88-C-1055-E and Ms. Edens was the only witness from the Bank.

24. On September 9, 1988, this Court held that the jeopardy assessment was unreasonable because the Internal Revenue Service did not fully investigate the nature of the Buel H. Neece Family Revocable Trust. This Court found that a thorough investigation would have revealed that the United States was in no worse position relative to the real properties transferred to the trust than if no trust existed, and, therefore, the jeopardy assessment was abated.

25. This Court did not grant Plaintiffs' request for attorney fees in its final judgment in case no. 88-C-1055-E.

26. The Plaintiffs filed the instant case alleging that the transfer of bank records pertaining to customers Buel H. Neece and Peggy J. Neece by Mikel Hoffman to Special Agent Benuzzi on April 26, 1988 was in violation of the Right to Financial Privacy Act, 12 U.S.C. §§3401 et seq. ("RFPA"). This Court held to the contrary and ordered the suit dismissed.

27. On appeal the Tenth Circuit reversed, holding that the receipt of the records was a violation of the RFPA and remanded the action to this Court to ascertain available defenses, if any, and

to determine damages.

28. The Plaintiffs amended their complaint to allege that the Bank's June 20, 1988 delivery of the checks, bank statements, and deposit slips was also a violation of the Right to Financial Privacy Act.

29. Prior to the enactment of the RFPA in 1978, the Internal Revenue Service officially took the position that 26 U.S.C. §7602(a)(1) authorized it to receive records which a third-party record keeper voluntarily turned over without the use of a summons. After passage of the RFPA in 1978, the Internal Revenue Service officially took the position that 26 U.S.C. §7602(a)(1), which authorizes the Internal Revenue Service to collect evidence on a voluntary basis without use of a summons, was a procedure authorized by the Internal Revenue Service Code falling within the ambit of 12 U.S.C. §3413(c) and, therefore, such an acquisition of records were exempted from the provisions of the RFPA and 26 U.S.C. §7609.

30. Subsequent to the Tenth Circuit's December 19, 1990, decision in this case, wherein it held that the Internal Revenue Service must comply with the RFPA notice provisions when obtaining records from a financial institution, the Internal Revenue Service continued to adhere to its prior position except within the Tenth Circuit where the Internal Revenue Service required that the Tenth Circuit's Neece decision be followed.

31. Plaintiff Buel H. Neece has claimed damage to his health because of the violation of his rights under the RFPA on April 26,

1988 and subsequent jeopardy assessment in June of 1988. Dr. Covington, Buel H. Neece's doctor, testified to the following:

(a) That the following conditions were present in Buel Neece prior to the June of 1988 jeopardy assessment: morbid obesity, phlebitis, psoriasis, heartburn, arthritis, urological problems, sleep apnea, dizziness, and borderline hypertensive;

(b) That Buel Neece first had a heart attack in 1969 and second heart attack in 1984.

(c) That stress leads to anxiety and depression which, in turn, leads to weight gain.

(1) That he examined Buel Neece in March, 1988 at which time Buel Neece's weight was 292 pounds; however, the next time he saw Mr. Neece - on January 18, 1989 which was one year and six months subsequent to the jeopardy assessment - his weight was 278 (a weight loss of 14 pounds and his lowest weight recorded by Dr. Covington) and further that, the next time he examined Mr. Neece on September 8, 1992, his weight was 325. Dr. Covington testified that he was unable to say with a reasonable degree of medical certainty that the symptoms he has observed in Mr. Neece since January 1989, are related to the jeopardy assessment of June 10, 1988.

32. Plaintiff Buel H. Neece claimed property damage to his Rolls Royce, to an antique Packard he owned, and to a bulldozer he owned. Charles R. Thompson, a garage mechanic testified that the damage to these items could be repaired at the following rates: about $1,000 for painting the Rolls Royce and about $450 to $550 for buffing it; repair of the flat tire on the Packard for a minimal amount, and the bulldozer could be repaired for $28 to $30. Mr. Neece estimated it would take $2,500 to repair the above damage.

33. Peggy J. Neece testified that the various litigation matters with the Internal Revenue Service had distressed, humiliated and embarrassed her.

34. Witnesses testified that the Plaintiffs' reputation in the community was not impaired. No compelling testimony was offered as to any specific loss of income or business loss that was occasioned by the violation of Plaintiffs' rights under the RFPA by the Internal Revenue Service and the Bank on April 26, 1988.

CONCLUSIONS OF LAW

1. The Right to Financial Privacy Act (hereinafter "RFPA"), 12 U.S.C. §§3401-3422, provides for the following elements of damages: (1) $100 for each violation without regard to the volume of records involved; (2) actual damages sustained by the customer as a result of the violation; (3) punitive damages if the violation was willful or intentional; and (4) costs and reasonable attorney fees relative to a successful action under the Right to Financial

Privacy Act.

2. Section 3417(c) of Title 12, United States Code (the "Good Faith Defense") provides:

> Any financial institution or agent or employee thereof making a disclosure of financial records pursuant to this chapter in good faith reliance upon a certificate by any government authority or pursuant to the provisions of section 3413(e) of this title [providing for disclosure of financial records of Bank insiders] shall not be liable to the customer for such disclosure under this chapter, the constitution of any state, or any law or regulation of any state or any political subdivision of any state.

Under the facts adduced at trial, the Defendant Bank is not entitled to the Good Faith Defense.

3. The Plaintiffs are each entitled to $100 in damages from Defendants Internal Revenue Service and First National Bank of Turley as statutory damages under 12 U.S.C. §3417(a)(1) for the violation of the Right to Financial Privacy Act.

4. The term "actual damages" as used in 12 U.S.C. §3417(a)(1) is neither defined in the statute, nor in the legislative history, nor in any judicial decisions. However, the term "actual damages" has been used in providing for damages in a similar federal statute, to-wit the Privacy Act, 5 U.S.C. §552(g)(4)(A). The United States Court of Appeals for the Eleventh Circuit in Fitzpatrick v. Internal Revenue Service, 665 F.2d 327 (11th Cir. 1982) has held that the term "actual damages" is not synonymous with common-law general damages but refers to pecuniary loss, and, thus does not extend to generalized mental injuries, loss of reputation, embarrassment or other nonquantifiable

injuries. However, it is not necessary for the Court in this case to address the issue of whether or not generalized injuries not resulting in out-of-pocket costs are recoverable under the RFPA because the Plaintiffs failed to present any evidence of compensable nonpecuniary losses to the trial court. Dr. Covington was unable to link any of Mr. Neece's physical ailments to the RFPA violation. There was no testimony of injury to either of Plaintiffs' reputations. The only evidence at trial was that Plaintiffs suffered personal embarrassment as a result of the jeopardy assessment; however, "hurt feelings alone [do not] constitute actual damages compensable under the statute [26 U.S.C. §6103]." Rorex v. Traynor, 771 F.2d 383, 387-88 (8th Cir. 1985)(Case interprets analogous section of Internal Revenue Code forbidding, subject to various exceptions, disclosure of tax return information by Internal Revenue Service). Accordingly, the Plaintiffs herein are not entitled to recover for mental injuries, embarrassment, loss of reputation.

5. Plaintiffs again make a claim for attorneys fees arising from case no. 88-C-1055-E as damages in this action. In case no. 88-C-1055-E, this Court ordered the jeopardy assessment abated, but did not grant Plaintiffs' request for an award of plaintiffs' attorney fees. Plaintiffs also sought attorney's fees from the Tenth Circuit on the appeal of case no. 88-C-1055-E which the Tenth Circuit denied. Denial of an attorney fees award in case no. 88-C-1055-E, an action between the same parties, and concerning the same operative facts as the instant case, is therefore res judicata.

Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979); see also Northern Natural Gas Co. v. Grounds, 931 F.2d 678, 681 (10th Cir. 1991); Thurston v. United States, 810 F.2d 438 (4th Cir. 1987).

6. The damage to the two cars and the bulldozer is estimated to be approximately $1,580.00. The damage was sustained as a result of the disclosure; hence the sum of $1,580.00 is recoverable as actual damages.

7. Section 3417(a)(3) of the RFPA, states that punitive damages may be awarded "where the violation is found to have been willful or intentional." The terms "willful or intentional" are not defined in the Act and no case since the passage of the RFPA has interpreted this provision. In the case of Andrews v. Veterans Administration of the United States, 838 F.2d 418 (10th Cir. 1988), the Tenth Circuit construed the terms "intentional or willful" as used in the Privacy Act, 5 U.S.C. §522a(g)(1).

> We reiterate Parks' conclusion that premeditated malice is not required to establish a willful or intentional violation of the Privacy Act. **Nonetheless, the term "willful or intentional" clearly requires conduct amounting to more than gross negligence. We are persuaded by the District of Columbia Circuit's definitions of willful or intentional that contemplate action "so 'patently egregious and unlawful' that anyone undertaking the conduct should have known it 'unlawful,'"** Laningham, 813 F.2d at 1242 (quoting Wisdom v. Department of Housing & Urban Development, 713 F.2d at 425 (8th Cir. 1983)) ***.

Andrews, supra at 425 (emphasis added). The Tenth Circuit's interpretation of the terms "intentional or willful" as used in the

Privacy Act gives the Court the best guide as to what is the proper standard for these same terms under the RFPA. Therefore, to recover punitive damages against the Internal Revenue Service in this case, Plaintiffs must prove that Defendants' actions were "so 'patently egregious and unlawful' that anyone undertaking the conduct should have known it 'unlawful'." Andrews, supra at 425.

8. The Plaintiffs are not entitled to punitive damages as the policies and instructions of the Internal Revenue Service are not so patently unreasonable as to amount to a willful violation of the RFPA.

9. In addition to the nominal and actual damages to which the Plaintiffs are entitled, as stated above, under 12 U.S.C. §3417 Plaintiffs are also entitled to the costs in the instant action and their reasonable attorney fees, which shall be determined by this Court in a subsequent hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Judgment shall be entered in favor of Plaintiffs; that Plaintiffs shall recover from Defendants $200 in nominal damages; and $1,580.00 in actual damages along with costs and reasonable attorney fees incurred herein.

So ORDERED this 20th day of May, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 91-C-898-C
Donald A. Plisco, Defendant.	)	

AGREED JUDGMENT

This matter comes on for consideration this 19th day of ~~April~~ May, 1993, the Plaintiff appearing by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Donald A. Plisco, appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, Donald A. Plisco, was served with Summons and Complaint on March 2, 1993. Donald A. Plisco sought to acquire counsel but was unsuccessful. The Defendant has not filed an Answer but in lieu thereof has agreed that Donald A. Plisco is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Donald A. Plisco in the principal amount of $3,310.37, plus administrative costs in the amount of $87.00, plus accrued interest in the amount of $1,224.32, plus interest thereafter at the rate of 3% per annum until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of $3,310.37 plus administrative costs in the amount of $87.00, plus accrued interest in the amount of $1,224.32, plus interest thereafter at the rate of 3% per annum until judgment, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

(Signed) H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

F. L. Dunn, III
United States Attorney

KATHLEEN BLISS ADAMS
Assistant United States Attorney

Donald A. Plisco

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY B. WATSON,

Plaintiff,

vs.

AMERICAN AIRLINES, INC.,

Defendant.

Case No. 92-C-211-B

ORDER

Now before the court for decision is the pleading Motions To Dismiss Certain Claims Or, In The Alternative, For Partial Summary Judgment And To Strike Jury Demand (#18) filed by the plaintiff, Larry B. Watson (Watson) against the defendant, American Airlines, Inc. ("American").

The plaintiff, Watson, initiated this lawsuit alleging termination of employment in violation of Title VII of the Civil Rights Act of 1964 , 42 U.S.C. §§ 2000e, et seq. ("Title VII"), breach of contract, public policy tort of wrongful discharge[1], outrage, and intentional infliction of severe emotional distress ("IIED"). Watson demands a trial by jury.

I. STATE-LAW TORT ACTIONS

Watson was discharged from employment at American on November 16, 1988 because he allegedly showed signs of alcohol intoxication while on the job. He filed a grievance with American which was

[1] See Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1225; see also Burk v. K-Mart, 770 P.2d 74 (Okl. 1989).

heard January 24, 1989. Watson claimed that his supervisor's accusations of intoxication were false and that he should be reinstated with back pay. His grievance was denied on February 23, 1989. Watson, a black, then timely filed a Complaint with the Equal Employment Opportunity Commission ("EEOC") and the Oklahoma Human Rights Commission ("OHRC") claiming he was wrongfully terminated on the basis of race. EEOC issued a determination, adverse to Watson, and a "right to sue letter." Watson commenced this action on March 10, 1992.

The defendant, American, argues that Watson's state law claims of outrage, IIED, and wrongful discharge should be dismissed on the grounds that they are barred by the applicable 2-year statute of limitations provided for in Okl. Stat. tit., 12 § 95(Third) (1971). Watson asserts that his state law tort claims are not barred by the statute of limitations because the statute was tolled during the EEOC and OHRC investigation.

Watson relies on Salgado v. Atlantic Richfield Co., 823 F.2d 1322 (9th Cir. 1987) and Chavira v. Payless Shoe Source, 140 F.R.D. 441 (E.D. Cal. 1991) for the proposition that the equitable tolling doctrine applies in this case. The Salgado case is inapposite and the holding in Chavira is contrary to the weight of authority.

In Salgado and Chavira the plaintiffs filed complaints alleging discrimination under the California Fair Employment and Housing Act ("FEHA") with the EEOC and the California Department of Fair Employment and Housing ("DFEH" or "the Department"). The EEOC and the Department have a "work sharing" agreement whereby only one

agency is responsible for the investigation and evaluation of the merits of a complaint. When the Department closes a case on the basis that the processing has been waived to the EEOC it issues a "right to sue" letter indicating that "[a]ny court action must be taken within one year of the date of this notice." Cal. Gov't Code § 12965(b) (West 1987). "Under the FEHA, the right to sue accrues from the time a party receives a right-to-sue notice from the Department, not the EEOC." Salgado, at 1326. Salgado and Chavira did not file suit within one year of the "right to sue" letter from the Department. Instead, they waited for the outcome on the merits from the EEOC.

The defendant in Salgado argued that Salgado's FEHA claim was barred by the statute of limitations. Salgado claimed that the EEOC investigation tolled the statute of limitations for the DFEH claim. In Salgado the Ninth Circuit allowed equitable tolling of the one year statute of limitations. The Court noted that the Department deferred processing of Salgado's claims to the EEOC and "Salgado had to await the outcome of the EEOC's processing of his claims in order to receive the full benefit of an investigation." Salgado at 1326.

In Chavira the Plaintiff, rather than bring an FEHA claim, alleged a state law claim for emotional distress. Defendants claimed it was barred by the statute of limitations. The Court, applying the Salgado rule and reasoning, 140 F.R.D. at 446, saw "no reason why a rule which tolls the statute on a DFEH claim during an EEOC investigation would not toll the statute on a related common

law claim." Id. Apparently the United States Magistrate who decided the Chavira case chose not to consider the Ninth Circuit opinion in Arnold v. United States, 816 F.2d 1306 (9th Cir. 1987), on this issue.[2] In Arnold, Plaintiff filed a complaint with the EEOC alleging that she had been sexually harassed by the Postmaster at the United States Postal Service where she worked. The EEOC entered a decision adverse to her on September 19, 1983. She brought suit in United States District Court pursuant to Title VII asserting sexual discrimination and harassment. She further asserted state law claims of assault, false imprisonment, intentional infliction of emotional distress, and battery against the Postmaster. Id. at 1312. In her complaint she alleged that the harassment took place on September 23, 1981. She filed the lawsuit on November 7, 1983. Under California law her state law tort claims were required to be filed within one year of their accrual.

Arnold argued that her Title VII claim tolled the statute of limitations for her tort claims. The Ninth Circuit disagreed. It relied on Johnson v. Railway Express Agency, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) which held that the statute of limitations for a claim brought pursuant to 42 U.S.C. § 1981 is not tolled by filing a Title VII charge with the EEOC. In Johnson the Supreme Court determined that "the filing of a Title VII charge and

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[2] Although the Arnold case was brought pursuant to Title VII while Chavira was brought pursuant to California anti-discrimination law, the analysis should be the same. The Salgado Court stated "the procedures and remedies of Title VII and the California Fair Employment and Housing Act ("FEHA") are wholly integrated and related." (footnote omitted).

resort to Title VII's administrative machinery are not prerequisites for the institution of a § 1981 action." 421 U.S. at 460. The Supreme Court explained that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct and independent." Id. at 461.

The Ninth Circuit found:

> [T]he wrong underlying Arnold's Title VII claim is distinct from that underlying her state-law tort claims. In her state-law claims Arnold seeks to vindicate not her right to be free from discrimination in the workplace, but rather her right to be free from "'bodily or emotional injury caused by another person.'" Otto, 781 F.2d at 756 (quoting Stewart v. Thomas, 538 F.Supp. 891, 895 (D.D.C. 1982)). Indeed, it is precisely because these wrongs are different that Arnold's state-law claims are not precluded by Title VII. Id. at 756-57.

Arnold at 1312-1313.

The Court further found that federal policy does not mandate equitable tolling. Id. Plaintiffs do not have an obligation to delay litigation until their Title VII claims are resolved. See Id. The Ninth Circuit held that Arnold was barred by the statute of limitations from pursuing her state law tort claims. Id.

In the instant case Watson's public policy, outrage, and IIED causes of action are separate and distinct from his Title VII discrimination claims.[3] There was no reason why Watson could not have filed suit on his tort claims before receiving a right-to-sue letter from the EEOC. Because there is no basis for tolling the

[3] The Oklahoma Supreme Court has stated that "states' remedies for relief from employment discrimination and for the compensation of its victims may be both different from and broader than those provided by Title VII." Tate v. Browning-Ferris, Inc. 833 P.2d 1218, 1223 (Okl. 1992).

limitations period for Watson's state-law tort claims such claims are barred and should be dismissed from this lawsuit.

II. BREACH OF CONTRACT

At the time Watson was terminated from employment at American, American and the Transport Workers Union of America were parties to a collective bargaining agreement ("CBA"). The basis for Watson's termination under the CBA was American's Rules and Regulations, particularly Rule 25 which states in pertinent part:

> Reporting for or carrying on work while showing any signs of the use of intoxicants, or permitting another employee to do so, is prohibited.

In his complaint, Watson asserts he was not intoxicated and he, therefore, could not have shown signs of being intoxicated.[4] He, therefore, maintains that American breached the CBA.

American argues that Watson's breach of contract claim should be dismissed because it is a "minor" dispute which is preempted by the Railway Labor Act, 45 U.S.C. §§ 151-188 ("RLA") and this Court has no jurisdiction over the claim. The Court agrees.

The CBA provides for a grievance procedure in accordance with the Railway Labor Act. Watson, through his union, filed a grievance of termination. The Union grievance procedure provided for in the CBA and permitted by the RLA concludes with a binding arbitration before a three-person System Board of Adjustment (the "Board"). The Board is composed of one American representative, one Union representative, and one neutral arbitrator. An

[4] Watson claims that he suffers from a blood disorder and the symptoms that he displayed were a result of his physical ailment, not intoxication.

arbitration hearing on Watson's termination occurred before the Board. The question before the Board was whether American had just cause to terminate Watson for violation of American's Rule 25. The Board answered in the affirmative.

Both Watson and American agree that "the power of this Court to review final Arbitration holdings is limited to a minimal number of situations." (Plaintiff's Response to Defendant's Motions to Dismiss and for Summary Judgment at 9.) Watson argues that this is such a situation. He claims that the Board failed to consider blood alcohol test results from the Hillcrest Medical Center and American's company sponsored lab urinalysis. He asserts that he has a legitimate objection to the Board's findings because he was denied due process by the Board. He cites Hall v. Eastern Airlines, Inc., 511 F.2d 663 (5th Cir. 1975) for the proposition that a failure to consider evidence proffered by the grievant at a Board arbitration is a denial of due process.

A reading of the Board's written decision clearly reveals that the Board did consider and weigh the evidence of the blood and urine tests. See Tulsa Area Board of Adjustment, Case No. M-439-88 TULE, Feb. 23, 1989 pp. 8-11, 25-20. "The Board, of course, is entitled to completely reject ... evidence after reviewing it on the merits ...." Hall, 511 F.2d at 664. In this case the Board has properly arbitrated the plaintiff's grievance on the merits and this Court will not review its holding.

III. JURY TRIAL

American argues that the plaintiff is not entitled to a jury

trial on his Title VII claim because the 1991 Civil Rights Act is not retroactive and he has not sought compensatory or punitive damages. The plaintiff concedes that his Title VII claim cannot be tried to a jury. It has now been determined that the plaintiff's pendent state-law claims are not valid. The Plaintiff is, therefore, not entitled to a trial by jury.

CONCLUSION

The 2-year statute of limitations provided for in Okla. Stat. tit., 12 § 95 (Third) (1971) has run on the plaintiff's state-law tort claims. Such tort claims are hereby dismissed with prejudice. In addition, because the Board of Adjustment's decision is final and not subject to review, the plaintiff's breach of contract action is dismissed. Finally, the plaintiff's jury demand is hereby denied because no valid state-law claims remain in this matter. Non-jury trial on the remaining Title VII claim is scheduled for July 26, 1993, at 9:00 a.m.. The parties are directed to file suggested Findings of Fact and Conclusions of Law, and trial briefs, if any, on or before July 12, 1993.

IT IS SO ORDERED this 24 day of May, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE